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No. _____

In The
Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,

Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

ALAN GURA*
ROBERT A. LEVY
CLARK M. NEILY III

GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the court of appeals erred in holding, in acknowledged conflict with this Court's decisions in *Babbitt* v. *United Farm Workers National Union,* 442 U.S. 289 (1979) and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), that cross-petitioners cannot maintain a pre-enforcement constitutional challenge to a criminal law without showing that they "have been singled out or uniquely targeted by the D.C. government for prosecution." Petitioners' Appendix ("Pet. App.") at 7a.

LIST OF PARTIES

Cross-Petitioners Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon ("Cross-Petitioners"), along with Respondent Dick Anthony Heller, initiated the proceedings below by filing a complaint against Cross-Respondent District of Columbia and its former Mayor, Anthony Williams, in the United States District Court for the District of Columbia. Cross-Petitioners and Respondent Heller (collectively "Respondents") appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit.

Cross-Respondent Adrian Fenty was substituted for Anthony Williams by the Court of Appeals upon his succession to the Mayoralty. The District of Columbia and the Mayor are hereafter referred to as "Petitioners."

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The District of Columbia Circuit's opinion is reported at 478 F.3d 370 (D.C. Cir. 2007). See Pet. App. at 1a-70a. The district court's opinion is reported at 311 F. Supp. 2d 103 (D.D.C. 2004). See Pet. App. at 71a-83a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2007. A petition for rehearing was denied on May 8, 2007. Petitioners sought and obtained an extension of time for filing a petition for a writ of certiorari until September 5, 2007. The petition was filed on September 4, 2007, and placed on the Court's docket on September 5, 2007, under case number 07-290. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution is reproduced on Page 1 of the petition. D.C. Code §§ 7-2501.01(12), 7-2502.01, 7-2502.02, and 7-2507.02 are reproduced in the appendix to the petition. Pet. App. at 91a-98a. D.C. Code §§ 7-2507.02, 7-2507.06, 22-4504, and 22-4515, are reproduced in the Appendix to this cross-petition, App. at 39-41.

STATEMENT

On February 10, 2003, Cross-Petitioners and Respondent Heller brought this lawsuit in the United States District Court for the District of Columbia against the District of Columbia and its then-Mayor Anthony Williams, challenging the constitutionality of Washington, D.C.'s various bans on the possession of handguns and functional firearms within the home. The district court had jurisdiction over the subject matter of the case under 28 U.S.C. § 1331 and § 1343.

On April 4, 2003, another lawsuit challenging the same laws, *Seegars* v. *Ashcroft*, was filed in the U.S. District Court for the District of Columbia. *Seegars* asserted a number of legal theories and claims different than those advanced by Respondents in this case. The *Seegars* plaintiffs moved to consolidate their case with this one, but that motion was denied. App. at 1-2. Thereafter the cases proceeded on separate tracks.

Attorney General Ashcroft, a defendant in *Seegars* but not in the instant case,[1] moved to dismiss *Seegars* for lack of standing. Although the Mayor was a defendant in *Seegars*, the Petitioners failed to raise any standing arguments in this case (*Parker* v. *District of Columbia*) until prompted to do so by the district court during a hearing on the parties' cross-dispositive motions. Indeed, Petitioners' counsel admitted that Petitioners had no intention of questioning Respondents' standing to challenge the law had the district court not raised the issue. App. at 4-6. Petitioners' amici likewise failed to raise standing in their briefing. App. at 6-8.

Throughout the proceedings below, Petitioners repeatedly conceded what is common knowledge, namely that they zealously enforce Washington, D.C.'s gun laws. For example, Respondents filed a motion for summary judgment with thirty-four separate assertions of undisputed material facts, the last of which stated that "Defendants actively enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504." App. at 19. Petitioners did not contest this assertion. App. at 20-23. Respondents also asserted that Petitioners do not issue the required permits to carry firearms inside one's home, and Petitioners conceded this point as well. App. at 18 (undisputed material fact no. 32). The district court was thus free to treat these allegations as admitted. D.D.C. LCvR 7.1(h), 56.1.

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[1] The laws at issue are misdemeanors, not felonies. In the District of Columbia, misdemeanors are prosecuted by the District of Columbia's Office of the Attorney General. D.C. Code § 23-101(a).

Petitioners have proclaimed their vigorous enforcement of the challenged laws. For example, Mayor Williams and Police Chief Charles Ramsey held a "town hall" meeting concerning these laws, attended by Respondents Parker, Heller, and St. Lawrence. Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, Mayor Williams stated, in part, "we need tougher enforcement." App. at 24, 26, 28.

Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 guns were confiscated in each of the previous two years, and his department confiscated 1,400 guns in the first half of 2005. App. at 25, 27, 29.

Petitioners have repeatedly confirmed that they would prosecute Respondents for violation of the challenged laws if Respondents were to possess handguns or other functional firearms within their homes. The district court verified that Petitioners would prosecute Respondents for violating the challenged statutes.

> THE COURT: . . . The city is not going to essentially grant immunity to these people. If they go out and take steps to possess firearms, they'll be prosecuted, I assume. They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> MS. MULLEN: No, and I think that Your Honor is correct, but I don't think *the*

> *fact that if, in fact, they break the law and we would enforce the law that they're breaking*, that that necessarily confers automatic standing on them in this case . . . .

App. at 5 (emphasis added). Cross-Petitioners St. Lawrence and Lyon, and Respondent Heller, were present in the courtroom to hear Petitioners' attorney confirm that they would be prosecuted were they to act on their present intention to exercise their constitutional rights.

Petitioners later confirmed to the court of appeals that "*if* they [Respondents] break a law, the District would normally enforce it." App. at 33 (emphasis in original).

These specific prosecutorial threats against Respondents were consistent not only with Petitioners' well-known zealous enforcement of the law, but also with their statements to the press regarding this case. In a front-page *Washington Times* article about this lawsuit, Mayor Williams' official spokesperson and the District's Deputy Mayor for Public Safety and Justice reiterated the city's commitment to enforcing the gun bans and expressed their belief that Respondents would pose a danger to themselves and to others, including children, "which is not what we want." Jon Ward, *Residents Challenge District's Gun Ban*, WASHINGTON TIMES, February 12, 2003, p. A1.

After receiving additional briefing from the parties on the question of standing, the district court issued a decision on the merits that made no mention of standing and thus tacitly rejected the Petitioners' belated arguments on that point. Though recognizing the "many thought-provoking and historically interesting arguments for

finding an individual right" protected by the Second Amendment, the district court held that no such right exists. Pet. App. at 83a.

Meanwhile, in the parallel *Seegars* litigation, the district court had accepted the standing defense asserted by Attorney General Ashcroft (and adopted but not briefed by Mayor Williams) as against all but one of the plaintiffs in that case. Because the district court found that one of the *Seegars* plaintiffs had standing, it reached the merits of that case, and held for defendants on all causes of action. *Seegars* v. *Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004).

Seegars reached the court of appeals first, and the court held that none of the *Seegars* plaintiffs had standing to maintain their challenge to the District's firearms prohibitions. *Seegars* v. *Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005). The court accepted that "the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest," *id.* at 1254, and accepted the "assurance of [plaintiffs'] conditional intent to commit acts that would violate the law," *id.* at 1255, but nonetheless found plaintiffs lacked standing because they "allege[d] no prior threats against them or any characteristics indicating an especially high probability of enforcement against them." *Id.*

In reaching this conclusion, the court of appeals explained that it felt bound by its precedent in *Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997). Yet the panel expressed reservations about that case. "We cannot help noting that *Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations," *Seegars*, 396 F.3d at 1253, and that

"[t]here is also tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes." *Id.* at 1254.

The court also conceded that *Navegar* was inconsistent with the pre-enforcement standing requirements of at least one circuit, *id.* at 1255, and, more critically, with the pre-enforcement standing requirements announced by this Court. The court of appeals noted that "the idea of a special First Amendment rule for preenforcement review of statutes seems to have no explicit grounding in Supreme Court decisions," and indeed that this Court "conspicuously neglected to mention [such a] point in its discussion of standing" in *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 297-302 (1979). *Seegars*, 396 F.3d at 1254.

"Despite these apparent tensions," *Seegars* applied *Navegar* to deny standing, "*not* because it represents our 'law of firearms,' . . . [but] because it represents the only circuit case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Id.* at 1254 (emphasis in original) (citations omitted).

Among the votes for en banc review of *Seegars* was that of the current Chief Justice of the United States. *Seegars* v. *Gonzales*, 413 F.3d 1 (D.C. Cir. 2005). On January 23, 2006, this Court denied a petition for certiorari in *Seegars*. *Seegars* v. *Gonzales*, 546 U.S. 1157 (2006).

Nine months after its decision in *Seegars*, the court of appeals granted Respondents' motions to have their case proceed, and denied Petitioners' motions for summary affirmance. The court of appeals instructed the parties "to

address both standing and the merits of the case in their briefs." App. at 36.

The court of appeals heard argument in this case on December 7, 2006. The following month, this Court issued its opinion in *Medimmune, Inc.* v. *Genentech*, 127 S. Ct. 764 (2007). Respondents promptly filed a letter pursuant to Fed. R. App. P. 28(j), advising the court of appeals panel of *Medimmune* and noting its incompatibility with circuit precedent that would deny Respondents' standing. App. at 37-38.

On March 9, 2007, the court of appeals reversed the district court's decision in *Parker*. Pet. App. at 1a-70a. With respect to Respondents' standing, the court of appeals held that "we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution." Pet. App. at 7a. Addressing the various threats of prosecution identified by Respondents, the court of appeals held that "[n]one of the statements cited by appellants expresses a 'special priority' for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so." Pet. App. at 8a (emphasis in original).

Accordingly, the court of appeals held that Respondents lacked standing to assert a pre-enforcement constitutional challenge. However, as Respondent Heller had been denied a registration permit for a handgun, the court of appeals found he had standing to pursue his claim against the handgun ban. *Id.* Because the other challenged gun ban provisions "would amount to further conditions on the certificate Heller desires, Heller's standing to pursue the license denial would subsume these other claims too."

Id. Then, reaching the merits, the court of appeals held that the city's bans on the home possession of functional firearms by law-abiding, adult citizens is inconsistent with "the right of the people to keep and bear arms" secured by the Second Amendment. Pet. App. at 54a-55a.

Respondents support Petitioner's petition for certiorari, but will address the various misstatements of fact and law contained in that petition in their response. Sup. Ct. R. 15.2. This separate cross-petition is conditional upon the grant of the petition for certiorari.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. On the Issue of Standing, the Opinion Below Admittedly Contradicts This Court's Settled Precedent.

The court of appeals' conclusion that Respondent Heller had standing to contest the denial of his permit application and maintain his other related claims was an unremarkable and routine application of settled law. But the same cannot be said of the court's treatment of pre-enforcement standing with respect to Cross-Petitioners. That the D.C. Circuit's pre-enforcement standing doctrine conflicts with this Court's settled precedent requires little annotation, as the court of appeals all but admitted that its decision below "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As the court of appeals put it,

> The unqualified language of *United Farm Workers* would seem to encompass the claims raised

> by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia* v. *American Booksellers Ass'n*. . . . In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," without any additional requirement that the challenged statute single out particular plaintiffs by name. In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.

Pet. App. at 6a-7a (internal citations and footnote omitted).

On denial of re-hearing en banc in *Seegars*, the panel opinion's author explained, "[a]s a panel we were constrained by recent circuit authority, *Navegar*, even though, as my opinion for the court made clear, it appeared to be in conflict with an earlier Supreme Court decision, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)." *Seegars* v. *Gonzales*, 413 F.3d 1, 2 (D.C. Cir. 2005) (Williams, Senior Circuit Judge) (first citation omitted).

This past term, in its most recent examination of standing to assert pre-enforcement actions under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., this Court explained:

> [W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the

> basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

Medimmune, Inc. v. *Genentech, Inc.*, 127 S. Ct. 764, 772 (2007) (emphasis omitted).

Reviewing its history of cases affirming the constitutionality of pre-enforcement standing, this Court explained,

> [i]n each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced.

Id.

Medimmune, *Babbitt*, and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), are flatly incompatible with *Navegar*, *Seegars*, and now the case at bar. Time and again this Court has explained that a statute's coercive effect is an Article III injury. Nevertheless, for the second time in three years, the D.C. Circuit has held precisely such an injury inadequate to confer standing upon citizens who have indisputably suffered it.

II. On the Issue of Standing, the Opinion Below Conflicts with Other Federal Courts of Appeals.

Considering that the D.C. Circuit's standing doctrine deviates so widely from this Court's precedent, it is not surprising that the decision below is "in conflict with the

decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The *Seegars* court acknowledged that its application of standing led to a squarely different result than that reached by the Sixth Circuit under similar factual circumstances in *People's Rights Organization* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (standing to challenge gun ban by plaintiffs possessing weapons outside of jurisdiction). *Seegars*, 396 F.3d at 1255. See also *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (police officer had standing to assert challenge to prohibition on firearms possession by persons convicted of domestic violence offenses); accord *Coalition of New Jersey Sportsmen* v. *Whitman*, 44 F. Supp. 2d 666, 673 n.10 (D.N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir. 2001) (manufacturers possessed standing to challenge state bans of certain firearms).

If anything, "[t]here may be a trend in favor of . . . a practical approach" to standing, where "courts are content with any realistic inferences that show a likelihood of prosecution." *New Hampshire Hemp Council, Inc.* v. *Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). The D.C. Circuit's standing approach is unique.

III. The D.C. Circuit's Erroneous Standing Doctrine Renders the Declaratory Judgment Act a Dead Letter in the Nation's Capital.

Cross-Petitioners' "predicament – submit to a statute or face the likely perils of violating it – is precisely why the declaratory judgment cause of action exists." *Mobil Oil Co.* v. *Attorney Gen. of Va.*, 940 F.2d 73, 74 (4th Cir. 1991). As the D.C. Circuit itself has acknowledged,

> [t]o require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

Navegar, Inc. v. *United States*, 103 F.3d 994, 1000-01 (D.C. Cir. 1997).

Yet those are precisely the consequences of allowing the court of appeals to continue demanding specific, individualized threats of prosecution as a pre-requisite for pre-enforcement challenges to criminal statutes. Government officials enforcing an unconstitutional law may avoid civil review of their conduct in federal courts simply by not issuing threats. After all, once a person is arrested and becomes the subject of criminal proceedings, the federal courts must abstain from hearing any civil challenge by the accused to the law's constitutionality. *Younger* v. *Harris*, 401 U.S. 37 (1971).[2]

Thus, applying both *Younger* and *Navegar* together, government officials in the D.C. Circuit are afforded immunity from federal court review of potentially unconstitutional laws. This result obtains even when the government maintains, as it does with respect to the laws here at issue, a harsh "zero tolerance" policy of zealous

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[2] The District of Columbia is treated as a state for purposes of *Younger* abstention. *JMM Corp.* v. *District of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422 (D.C. Cir. 2006).

enforcement against all violators, bragging of thousands of prosecutions a year and declaring the laws to be an aspect of the government's "fundamental core culture." Notably, the district court, by questioning Petitioners' counsel in open court, removed any doubt that Cross-Petitioners would be prosecuted were they to violate the challenged laws.

Indeed, under the D.C. Circuit's erroneous standing doctrine, complete immunity from federal review of government conduct may be obtained by simply eliminating any administrative processes. Had the D.C. government enacted a criminal prohibition on the possession of firearms without including the mechanism of an illusory permit process, nobody could challenge the laws at issue in this case except in the context of a "state court" criminal proceeding[3] – notwithstanding the fact that the government openly threatens the entire population with criminal prosecution for violating the challenged laws.[4]

The D.C. Circuit's standing doctrine amounts to a wholesale refusal to hear a large class of cases arising under the Declaratory Judgment Act – namely, any "non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency

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[3] The challenged laws are prosecuted as misdemeanors in the District of Columbia's Article I courts. But like residents of the fifty states, Respondents have a right to access Article III courts to resolve disputes arising under the Constitution. See, e.g., *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

[4] See *FEC* v. *Atkins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (citation omitted).

proceedings." *Seegars*, 396 F.3d at 1254. As the court of appeals noted, this is not only a "law of firearms." *Id.* For example, had the District of Columbia enacted the abortion restrictions struck down in *Roe* v. *Wade*, 410 U.S. 113 (1973) or *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), neither case would have reached this Court. Jane Roe averred no specific, personalized threats of prosecution were she to obtain an abortion. And in *Casey*, the petitioners initiated the litigation "[b]efore any of [the challenged] provisions took effect." *Casey*, 505 U.S. at 845. Plaintiffs in those two cases could not have claimed more immediate or "concrete" threats of enforcement than those leveled at Respondents here.

In demanding individualized threats of prosecution, a pre-enforcement challenge is virtually always too early, since even the government's open-court vow to prosecute a plaintiff is apparently too generalized a threat. But if a threat is not sufficiently particularized until it rises to the level of actual arrest and prosecution, the putative plaintiff can only be a criminal defendant, owing to *Younger* abstention. In that respect, a post-enforcement civil challenge is always too late.

The court of appeals' standing error is particularly troubling because it represents the law of the circuit that has direct jurisdiction over the seat of federal government. The impact of this errant doctrine is thus widespread and significant because it substantially curtails the people's right to access the federal courts to obtain judicial review of governmental conduct – not only by the District of Columbia, as in this case, but by the federal government as well. Restoring a pre-enforcement right of access to

federal courts, regardless of the Court's decision on the merits of Respondents' claims, is essential.

CONCLUSION

Cross-Petitioners respectfully request that the Court take this opportunity to clarify that pre-enforcement challenges under the United States Constitution may be heard in the nation's capital without demonstration of a personalized prosecutorial threat.

Respectfully Submitted,

ALAN GURA*
ROBERT A. LEVY
CLARK M. NEILY III
Attorneys for Cross-Petitioners

Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*

September 10, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 03-0213 (EGS) (Filed Jul 8, 2003)
SANDRA SEEGARS, *et al.*, Plaintiffs, v. JOHN D. ASHCROFT, *et al.*, Defendants.	Civil Action No. 03-0834 (RBW) (Filed Jul 8, 2003)

ORDER

Upon consideration of the motion to consolidate Civil Action No. 1:03-0213 (EGS) with Civil Action No. 1:03 CV 0834 (RBW), filed by plaintiffs in Civil Action No. 1:03 0834, and the motion to strike plaintiffs' declarations or, in the alternative, for leave to file a response to plaintiffs' reply to opposition to motion for recusal of counsel, filed by plaintiffs in Civil Action No. 1:03-0834, and which the Court shall construe as a sur-reply to the motion for recusal of counsel filed by plaintiffs in Civil Action No. 1:03 CV 0213, it is by the Court hereby **ORDERED** that the motion to consolidate is **denied** and that the motion for leave to file a sur-reply to plaintiffs' motion for recusal of counsel is **granted.**

Consolidation of the two cases would require resolution of complex attorney-client ethical and professional responsibility issues prior to any attempt to resolve the underlying substantive issues. Accordingly, in an effort to avoid any protracted delay in the resolution of the merits in either case, the Court will not consolidate the two cases.

Date: 7/2/03 /s/ Emmet G. Sullivan
EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, ET AL.,	)	
	)	C.A. No. 03-213 (EGS)
VS.	)	WASHINGTON, D.C.
	)	OCTOBER 14, 2003
DISTRICT OF COLUMBIA, ET AL.	)	10:00 A.M.
	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	ALAN GURA, ESQ. CLARK M. NEILY, III, ESQ. GENE HEALY, ESQ
FOR THE DEFENDANTS:	MARTHA J. MULLEN, ESQ. DANIEL A. REZNECK, ESQ.
FOR THE AMICI:	MATHEW S. NOSANCHUK, ESQ. DAVID M. GOSSETT, ESQ. FATIMA A. GOSS, ESQ. JOHN A. VALENTINE, ESQ. BRIAN J. SIEBEL, ESQ.
COURT REPORTER:	FRANK J. RANGUS, OCR U. S. COURTHOUSE, RM. 6822 WASHINGTON, D.C. 20001 (202) 371-0545

* * *

[7] THE COURT: I THINK I'VE HEARD ENOUGH. THANK YOU. LET ME HEAR FROM THE CITY. THE CITY HAS NOT RAISED STANDING. DO YOU CONCEDE THAT THERE IS STANDING?

MS. MULLEN: NO, YOUR HONOR, WE HAVEN'T CONCEDED THAT THERE'S STANDING, AND AS PLAINTIFF –

THE COURT: YOU DIDN'T RAISE THAT AS A BASIS FOR YOUR MOTION TO DISMISS.

MS. MULLEN: NO, WE DID NOT. WE RELIED ON –

THE COURT: WHY DIDN'T YOU RAISE IT? AND IF IT'S NOT BEEN RAISED, HAS IT NOT BEEN WAIVED?

[8] MS. MULLEN: NO, I DON'T BELIEVE THAT WE'VE NECESSARILY WAIVED IT.

THE COURT: WHEN WERE YOU PLANNING TO RAISE IT? HAD I NOT RAISED IT, WERE YOU GOING TO RAISE IT TODAY?

MS. MULLEN: NO, I WAS NOT PLANNING ON RAISING IT TODAY.

THE COURT: WHEN WERE YOU GOING TO RAISE IT? ON APPEAL?

MS. MULLEN: THE ISSUE WAS RAISED IN THE SEEGARS CASE AS IT APPLIED TO THE U. S. WE DIDN'T RAISE IT IN THE PARKER CASE, AND I CAN ADDRESS THAT BRIEFLY, BUT IT'S NOT ANYTHING

THAT WE HAVE PRESENTED TO THE COURT THUS FAR. I DON'T BELIEVE THAT THEY HAVE STANDING, AND WE ADOPTED, INCORPORATED THE ARGUMENTS THAT WERE PRESENTED IN THE SEEGARS CASE, THE COMPANION CASE, WHICH I KNOW YOU READ THE TRANSCRIPT. THE ORAL ARGUMENT WAS LAST WEEK, BEFORE JUDGE WALTON, AND I THINK WE WOULD AGREE THAT THERE HAS TO BE A MUCH TIGHTER NEXUS. WHAT PLAINTIFFS HAVE ALLEGED HERE IS ABSTRACT.

THE COURT: WHY IS IT ABSTRACT? THE CITY IS NOT GOING TO ESSENTIALLY GRANT IMMUNITY TO THESE PEOPLE. IF THEY GO OUT AND TAKE STEPS TO POSSESS FIREARMS, THEY'LL BE PROSECUTED, I ASSUME. THEY'RE NOT GOING TO GET A FREE RIDE BECAUSE THEY'RE A PLAINTIFF IN THIS CASE, ARE THEY?

MS. MULLEN: NO, AND I THINK THAT YOUR HONOR IS CORRECT, BUT I DON'T THINK THE FACT THAT IF, IN FACT, THEY [9] BREAK THE LAW AND WE WOULD ENFORCE THE LAW THAT THEY'RE BREAKING, THAT THAT NECESSARILY CONFERS AUTOMATIC STANDING ON THEM IN THIS CASE. ITS STILL A SITUATION WHERE YOU'RE DEALING, WITH THE ABSTRACT.

THE COURT: I GUESS I'M JUST CURIOUS AND SOMEWHAT CONFUSED. WHEN WAS THE CITY GOING TO RAISE STANDING? IF THE CITY IS CONCERNED THAT THERE'S A LACK OF STANDING, WHEN WERE YOU GOING TO ASSERT THAT ARGUMENT? I RAISED IT JUST BECAUSE OF MY CURIOSITY ABOUT IT. WHEN WAS THE CITY PLANNING TO

EITHER ARGUE LACK OF STANDING OR RAISE THE ISSUE?

MS. MULLEN: WELL, I THINK WHAT HAPPENED WAS, THE CASES WERE THOUGHT TO BE COMPANION CASES, AND THEREFORE, BY ADOPTING THE ARGUMENT THAT WAS PRESENTED BY THE UNITED STATES GOVERNMENT IN THE SEEGARS CASE, THAT WE HAD INCORPORATED THAT SAME RATIONALE IN PART, ALTHOUGH IT WAS NEVER EXPLICITLY BRIEFED.

* * *

[46] THE COURT: BUT YOU'RE ASKING ME NOW TO ESSENTIALLY ADOPT THE FEDERAL GOVERNMENT'S ARGUMENT IN THE SEEGARS CASE, THEN?

MS. MULLEN: YES.

THE COURT: ALL RIGHT. HAD I NOT –

MS, MULLEN: OR WE CAN, SINCE WE HAVE NOT WAIVED THE ISSUE. WE CAN BRIEF IT.

THE COURT: I'M CURIOUS. HAD I NOT RAISED THE ISSUE, WERE YOU GOING TO RAISE IT THIS MORNING?

MS. MULLEN: NO, I HAD NOT INTENDED ON RAISING IT THIS MORNING.

* * *

[73] THE COURT: I DON'T RECALL IF YOU, IN YOUR BRIEF, ADDRESS THE ISSUE OF STANDING OR NOT. I DON'T RECALL.

MR. NOSANCHUK: WE DID NOT ADDRESS THE ISSUE OF STANDING.

THE COURT: IS THERE STANDING HERE?

MR. NOSANCHUK: NO. I WOULD AGREE WITH THE COURT.

THE COURT: EVERYONE RECOGNIZES ON THIS SIDE THERE'S NO STANDING, BUT NO ONE RAISED IT. I FIND IT MYSTIFYING.

MR. NOSANCHUK: RIGHT. WELL, YOUR HONOR, WE WOULD, OBVIOUSLY, BE HAPPY TO SUBMIT SUPPLEMENTAL BRIEFING.

THE COURT: NO. I WAS JUST ASKING QUESTIONS. I'M NOT TRYING TO SIGNAL MY OPINION THAT THERE'S NOT STANDING. IT WAS JUST A LEGITIMATE QUESTION TO ASK. SO I HOPE I'M NOT SENDING THE WRONG SIGNALS TO EVERYONE THAT THERE'S NO STANDING HERE. BUT, I MEAN, CONSTITUTIONAL SCHOLARS AND LAWYERS OF LONG STANDING AND NO ONE RAISED IT? DON'T TURN YOUR HEAD AWAY. I MEAN, IF I HADN'T RAISED IT, IT WAS NOT GOING TO BE RAISED?

MR. NOSANCHUK: WELL, AS YOUR HONOR WELL RECOGNIZES, YOU KNOW, THE FAILURE OF A PARTY TO RAISE IT DOESN'T WAIVE THE ISSUE.

THE COURT: IT DOESN'T?

MR. NOSANCHUK: NO, AND YOU'RE FAMILIAR WITH THE TRANSCRIPT FROM THE HEARING IN SEEGARS WHERE THAT WAS DISCUSSED

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants.	Case No. 03-CV-0213-EGS **SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [LCvR 7.1(h), 56.1]**

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and submit their Separate Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

Dated: March 14, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
Robert A. Levy (D.C. Bar No. 447137)
Gene Healy (D.C. Bar No. 468839)
Clark M. Neily, III (D.C. Bar No. 475926)
1717 K Street, N.W., Suite 600
Washington, D.C. 20036
Phone: 202.550.8777
Fax: 202.3.45

By: /s/ Alan Gura
Alan Gura

Attorneys for Plaintiffs

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

	FACT		RECORD
1.	Plaintiff Parker resides in a high crime area of the District of Columbia	1.	Parker Decl., ¶ 1.
2.	Plaintiff Parker is very active in community affairs, organizing her community against drug dealers.	2.	Parker Decl., ¶ 2.
3.	Drug dealers have identified plaintiff as being adverse to their interests and have threatened her and her neighbors.	3.	Parker Decl., ¶ 3.
4.	On June 12, 2002, the back window of plaintiff Parker's car was broken. Her front window has been broken, a security camera was stolen from the outside of her home, and a drug user who acts as a lookout for the drug dealers on Parker's block smashed his car into her back fence.	4.	Parker Decl., ¶ 4.
5.	On the night of February 12, 2003, the date on which the *Washington Times* carried a front-page article about this lawsuit and Parker's role in it, a drug dealer she knew as "Nanook" started banging	5.	Parker Decl., ¶ 5.

	on Parker's door and tried to pry his way into her house, repeatedly yelling, "bitch, I'll kill you, I live on this block, too."		
6.	"Nanook" was eventually arrested and may be prosecuted. However, it has become apparent to Parker that her local police lieutenant is not going to do very much about the drug problem on her block.	6.	Parker Decl., ¶ 6.
7.	Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Parker is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home.	7.	Parker Decl., ¶ 7.
8.	Being deprived of a handgun limits Parker's ability to defend herself and her ability to act in concert with others for the common good. While Parker can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as	8.	Parker Decl., ¶ 8.

effectively as she could use a handgun, as a rifle or shotgun would be too unwieldy for her to use.

9. Plaintiff Dick Heller resides in a high-crime neighborhood of the District of Columbia, on Kentucky Avenue, S.E. There are two open-air drug markets in the immediate vicinity of his home.

9. Heller Decl., ¶ 1.

10. Plaintiff Heller is a Special Police Officer of defendant District of Columbia. As a Special Police Officer, he is licensed to and does carry a handgun in the course of his employment at the Thurgood Marshall Federal Judicial Center in Washington, D.C., providing security for the federal judiciary.

10. Heller Decl., ¶ 2.

11. Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional

11. Heller Decl., ¶ 3.

policies complained of in this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.	
12. Plaintiff Heller applied to defendant District of Columbia for permission to possess a handgun within his home but was refused.	12. Heller Decl., ¶ 4; Exh. A.
13. Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good.	13. Heller Decl., ¶ 5.
14. Plaintiff Tom G. Palmer resides in the District of Columbia.	14. Palmer Decl., ¶ 1.
15. Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional	15. Palmer Dec., ¶ 2.

handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.

16. In 1982, Palmer was assaulted by a group of men on account of his sexual orientation. He successfully warded off the assault with a handgun.

16. Palmer Decl., ¶ 3.

17. Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others for the common good.

17. Palmer Decl., ¶¶ 3, 4.

18. Plaintiff Gillian St. Lawrence resides in the District of Columbia.

18. St. Lawrence Decl., ¶ 1.

19. Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of unconstitutional policies from rendering the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. She is aware that she faces criminal penalties if she assembles and unlocks her shotgun at home under any circumstance.	19. St. Lawrence Decl., ¶ 2.
20. Even if she were allowed to piece together, unlock and load the shotgun in self-defense, she may not always be able to do so effectively in response to a sudden home invasion.	20. St. Lawrence Decl., ¶ 3.
21. Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good.	21. St. Lawrence Decl., ¶ 4.

22. Plaintiff Tracey Ambeau resides in the District of Columbia.	22. Ambeau Decl., ¶ 1.
23. Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possess a handgun, or any other functional firearm, at home.	23. Ambeau Decl., ¶ 2.
24. Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common good. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun because a rifle or shotgun would be too unwieldy.	24. Ambeau Decl., ¶ 3.
25. Plaintiff George Lyon resides in the District of Columbia.	25. Lyon Decl., ¶ 1.
26. Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun and	26. Lyon Decl., ¶ 2.

long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Lyon is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.	
27. Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good.	27. Lyon Decl., ¶ 3.
28. Defendants maintain a complete ban on the home ownership and possession of handguns by private citizens who did not register a handgun prior to September 24, 1976.	28. D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4); 7-2501.01(12)

29. Defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law.	29. D.C. Code § 7-2507.02
30. A first violation of the District of Columbia's ban on the ownership or possession of handguns or other functional firearms within the home for lawful purposes is punishable as a misdemeanor by a fine of up to $1,000, imprisonment of up to one year, or both. A second offense is punishable as a felony by a fine of up to $5,000, imprisonment of up to five years, or both, in the case of a handgun or other non-registerable firearm.	30. D.C. Code § 7-2507.06.
31. Any person who carries a handgun on his or her own property without a license is subject to one year imprisonment and/or a fine of $1,000.	31. D.C. Code §§ 22-4504, 22-4515.
32. "With very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable."	32. *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994).

33. Defendants provide handguns to District of Columbia police officers.	33. Heller Decl., ¶ 2; Request for Judicial Notice 1
34. Defendants actively enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504.	34. Heller Decl., ¶ 2; Exh. A; Request for Judicial Notice 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*,	:	
Plaintiffs,	:	
v.	:	Case No.
DISTRICT OF COLUMBIA, *et al.*,	:	03-CV-0213 (EGS)
Defendants.	:	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE

Pursuant to Rule LCvR 7.1(h) of this Court, defendants submits that there is a genuine issue of material fact as to the following statements in Plaintiff's Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment dated March 14, 2003:

7. Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendant's active enforcement of unconstitutional policies complained of in this action. Parker is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home. (Parker Dec., ¶ 7.)

11. Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional policies complained of in

this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Heller Dec., ¶ 3.)

13. Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good. (Heller Dec., ¶ 5.)

15. Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Palmer Dec., 1 ¶ 2.)

17. Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others for the common good. (Palmer, Dec., ¶¶ 3,4.)

19. Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the Shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of unconstitutional policies from rendering

the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. She is aware that she faces criminal penalties if she assembles and unlocks her shotgun at home under any circumstance. (St. Lawrence Dec., ¶ 2.)

21. Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good. (St. Lawrence Dec., ¶ 4.)

23. Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home. (Ambeau Dec., ¶ 2.)

24. Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common good. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun because a rifle or shotgun would be too unwieldy. (Ambeau Dec., ¶ 3.)

26. Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Lyon is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Lyon Dec., ¶ 2.)

27. Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good. (Lyon Dec., ¶ 3.)

The record references relied on to support this Statement of Material Facts as to which There Exists a Genuine Issue relating to these paragraphs are Exhibits A, B, and C to Defendants' Reply Memorandum in Support of their Motion to Dismiss.

Dated: June 3, 2003

Respectfully submitted,

ARABELLA W. TEAL
Interim Corporation Counsel

JOHN C. GREENHAUGH
Senior Deputy Corporation Counsel Torts and Equity Divisions

S/Robert C. Utiger/s [437130]
Deputy Corporation Counsel Equity Division

s/Martha Mullen/s
DANIEL A. REZNECK [31625]
MARTHA J. MULLEN [419036]
Senior Counsel
Equity Division
Office of the Corporation Counsel
441 Fourth Street, NW
Sixth Floor South
Washington, D.C. 20001
(202) 724-6612

FILED: June 3, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	
Appellees,	)	
v.	)	Case No. 04-7041
DISTRICT OF COLUMBIA, et al.,	)	**DECLARATION OF SHELLY PARKER**
Appellants.	)	

DECLARATION OF SHELLY PARKER

I, Shelly Parker, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 2 day of August, 2005.

/s/ Shelly Parker
Shelly Parker

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	
Appellees,	)	
	)	Case No. 04-7041
v.	)	
	)	**DECLARATION OF**
DISTRICT OF COLUMBIA, et al.,	)	**DICK HELLER**
	)	
Appellants.	)	

DECLARATION OF DICK HELLER

I, Dick Heller, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly reappear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws

. . . we are opening the floodgates . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 2nd day of August, 2005.

/s/ Dick A. Heller
Dick Heller

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al., Appellees, v. DISTRICT OF COLUMBIA, et al., Appellants.	)	Case No. 04-7041 **DECLARATION OF GILLIAN ST. LAWRENCE**

DECLARATION OF GILLIAN ST. LAWRENCE

I, Gillian St. Lawrence, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of August, 2005.

/s/ Gillian E. St. Lawrence
Gillian St. Lawrence

United States Court of Appeals
for the District of Columbia Circuit

SHELLY PARKER, *ET AL.*, *Plaintiffs-Appellants*,	:	
DISTRICT OF COLUMBIA, *Defendant-Appellee*	:	No. 04-7041

MOTION FOR SUMMARY AFFIRMANCE BY THE DISTRICT OF COLUMBIA AND OPPOSITION TO MOTION TO SET BRIEFING SCHEDULE

The District of Columbia moves for summary affirmance of the district court order dismissing the complaint and entering judgment in its behalf. The District court order is attached.

This litigation is indistinguishable from *Seegars v. Ashcroft* (D.C. Cir. Nos. 04-5016,-5081), in which the court held that identically-situated plaintiffs had no standing to bring a pre-enforcement facial challenge to District laws because none had demonstrated a threat of imminent prosecution.

Seegars is dispositive. No briefing or oral argument is warranted.

STATEMENT IN SUPPORT

As in *Seegars*, the complaint in this litigation asserts that District laws regulating firearms possession violate the Second Amendment. (The complaint is attached). The *Seegars* complaint challenged the identical laws on the same ground.

Seegars held that none of the plaintiffs had alleged "prior threats against them or any characteristics indicating an especially high probability of enforcement against them." Slip op. at 12. Although one of the plaintiffs owned a pistol outside the District that he wished to import into the District and another owned a registered shotgun but wanted to keep it unlocked in violation of District law, neither they nor the other plaintiffs had been personally threatened with prosecution: none had shown that their prosecution had any special priority for the government. *Id.* at 13. Accordingly, the *Seegars* plaintiffs had presented no justiciable case or controversy. *Id.* at 15.

Here, too, the complaint does not assert an especially high probability of enforcement against these plaintiffs or their imminent prosecution under the laws they challenge. It recites that they "presently intend" to have handguns in their homes. Complaint at 2-4. Some plaintiffs own pistols outside the District that they would like to import. *Id.*, ¶¶ 2, 3, 6. One alleges ownership of a registered shotgun that she wishes to unlock. *Id.* ¶ 4. The complaint asserts merely that plaintiffs fear possible arrest and prosecution. It does not allege that the plaintiffs were personally threatened with prosecution or that the government had demonstrated it placed a higher priority on prosecuting them than anyone else caught violating these misdemeanor laws. When the plaintiffs moved for summary judgment, their supporting affidavits did not significantly stray beyond the complaint's allegations. *See* attachments 4, 5, 6, 7, 8, 9 to docket entry no. 4.

In an attempt to distinguish the undistinguishable, plaintiffs seize on a newspaper article in which a spokesman for the Mayor asserted that the Mayor supported existing law and suggested that "people" who are armed

can be a danger to themselves and others. Parker mot. at 2-3, 6, & att. A. The newspaper article is hearsay. It is not part of the record on appeal. *See Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) (refusing to consider on appeal evidence not before the district court at the time it granted summary judgment). The spokesman is not a police official or a prosecutor. More to the point, he said nothing suggesting that these plaintiffs were being targeted for imminent arrest or prosecution. At most, his remarks can be read as stating a general policy that the District intends to enforce its weapons laws.

In another stretch to distinguish *Seegars,* plaintiffs' motion misconstrues colloquy in the district court on the hearing for summary judgment. The trial judge there expressed surprise that the District had not yet argued standing in its pleadings and motions. Parker mot., att. B at 8. Civil counsel for the District (who is not a prosecutor) responded that she believed plaintiffs had no standing and that their allegations were "abstract." *Id.* The trial judge countered that the allegations were not abstract:

> The city is not going to essentially grant immunity to these people. *If* they go out and take steps to possess firearms, they'll be prosecuted, *I assume.* They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> [Counsel]: No, and I think your honor is correct, but I don't think that *if, in fact,* they break the law and we would enforce the law that they're breaking, that necessarily confers automatic standing on them in this case. It's still a situation where you're dealing with the abstract.

Id., 8-9; italics added.

It is evident that civil counsel said no more than that District laws will generally be enforced if violated. *See Seegars,* slip op. at 12 (noting that the District has stated in previous litigation that it would prosecute "all violators of the [firearm] statute[s] under normal prosecutorial standards," quoting *Austin v. United States,* 847 A.2d 391, 393-394 (D.C. 2004); brackets added). Counsel agreed with the trial judge that the *Parker* plaintiffs would not "get a free ride" because of their involvement in this litigation. Far from issuing specific and personal threats of prosecution, she couched her language in the conditional tense: *if* they break a law, the District would normally enforce it. As matters currently stood, however, the "situation" was still too abstract. While her phrasing may have been inartful, nothing civil counsel said amounted to a threat of imminent, targeted, prosecution of these plaintiffs.

Following the trial court hearing, the District briefed the standing issue (docket entry no. 30) and plaintiffs filed a response (docket entry 32). Although the district court did not address standing in its opinion (311 F. Supp.2d 103), the issue of jurisdiction is always before the reviewing court. *Kontrick v. Ryan*, 540 U.S. 443, ___, 124 S. Ct. 906, 915 (2004), citing *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382 (1884); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 96 (1998) (court of appeals has "special obligation" to determine jurisdiction, quoting *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934)). The absence of standing is jurisdictional. It means that the case presents no justiciable case or controversy. *Seegars,* slip op. at 15. To the extent that the district court reached the merits rather than dismissing this action on jurisdictional grounds, *Seegars* establishes that it erred.

CONCLUSION

On the basis of *Seegars*, the judgment dismissing the complaint should be summarily armed for lack of jurisdiction.

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Corporation Counsel
EDWARD E. SCHWAB
Deputy Corporation Counsel
Appellate Division

/s/ Lutz Alexander Prager
LUTZ ALEXANDER PRAGER

Office of the Corporation Counsel
One Judiciary Square
441 Fourth Street N.W.
Washington, D.C. 20001-2714
Tel.: (202) 724-6613

February 23, 2005

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2005**

03cv00213

Filed On: November 2, 2005 [929164]

Shelly Parker, et al.,

Appellants

v.

District of Columbia,

Appellee

BEFORE: Henderson, Randolph, and Brown, Circuit Judges

ORDER

Upon consideration of the initial motion to issue a briefing schedule and set oral argument on the merits, the opposition thereto and motion for summary affirmance, the reply to the opposition to the initial motion and opposition to the motion for summary affirmance, the reply to the opposition to the motion for summary affirmance, the second motion to issue a briefing schedule and set oral argument on the merits, the opposition thereto, the reply, the motion to remand with instructions to dismiss or, alternatively, for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance and the motion to remand with instructions to dismiss or, alternatively, for summary affirmance be denied. The merits of the parties' positions are not so clear as to

warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). It is

FURTHER ORDERED that the motions to issue a briefing schedule and set oral argument on the merits be granted. The Clerk is instructed to calendar this case for presentation to a merits panel, and the parties are instructed to address both standing and the merits of the case in their briefs.

Per Curiam

GURA & POSSESSKY, P.L.L.C.
Virginia • Washington, D.C.
101 N. COLUMBUS STREET, SUITE 405
ALEXANDRIA, VIRGINIA 22314
TEL. 703.835.9085/FAX 703.997.7665

January 11, 2007

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Parker, et al. v. District of Columbia, et al.*
U.S. Court of Appeals, D.C. Cir. No. 04-7041

Supplemental Authority Per Rule 28(j)

Dear Mr. Langer:

Appellants call to the Court's attention the Supreme Court's decision this week in *Medimmune, Inc. v. Genentech, Inc.*, ___S.Ct.___, 2007 U.S. LEXIS 1003 (Jan. 9, 2007), observing:

> where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law *eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.*

Id., at *19-20 (latter emphasis added). In discussing various cases where pre-enforcement standing was found

to challenge the constitutionality of criminal acts, the Supreme Court explained:

> In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. The dilemma posed by that coercion –putting the challenger to the choice between abandoning his rights or risking prosecution – is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate."

Id., at *21 (citations omitted).

To the extent Appellants' standing is based upon pre-enforcement threat of prosecution, *Medimmune* is inconsistent with Appellees' interpretation of circuit precedent, purporting to impose an additional standing requirement that Appellants have been under present, imminent threat at the time of filing suit. *Medimmune* makes explicit that even if the threat is "eliminated," standing exists, because the "elimination" of the threat was coerced by the law.

Of course, *Medimmune* does not speak to Appellants' other equally valid standing claim, the injury-in-fact occasioned by the denial and non-availability of a permit.

Sincerely,

/s/ Alan Gura, Esq.
Alan Gura, Esq.

cc: All Counsel of Record

The body of this letter contains 285 words.

D.C. Code § 7-2507.02 Firearms required to be unloaded and disassembled or locked

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

D.C. Code § 7-2507.06. Penalties

Any person convicted of a violation of any provision of this unit shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both; except that:

(1) A person who knowingly or intentionally sells, transfers, or distributes a firearm, destructive device, or ammunition to a person under 18 years of age shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(2) (A) Except as provided in subparagraph (B) of this paragraph, any person who is convicted a second time for possessing an unregistered firearm shall be fined not more than $ 5,000 or imprisoned not more than 5 years, or both.

(B) A person who in the person's dwelling place, place of business, or on other land possessed by the person, possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than $ 1,000 or imprisoned not more than 1 year, or both.

(3) A person convicted of knowingly possessing restricted pistol bullets in violation of § 7-2506.01(3) may

be sentenced to imprisonment for a term not to exceed 10 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 1 year and shall not be released from prison or granted probation or suspension of sentence prior to serving the mandatory-minimum sentence, and, in addition, may be fined an amount not to exceed $ 10,000.

D.C. Code § 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $ 5,000 or imprisoned for not more than 5 years, or both; or

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.

D.C. Code § 22-4515. Penalties

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $ 1,000 or imprisonment for not more than 1 year, or both.

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No. 07-335

FILED
OCT 12 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,
Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

THOMAS GOLDSTEIN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

WALTER DELLINGER
MATTHEW M. SHORS
MARK S. DAVIES
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

LINDA SINGER
Attorney General
ALAN B. MORRISON
Special Counsel to the Attorney General
TODD S. KIM
Solicitor General
Counsel of Record
EDWARD E. SCHWAB
Deputy Solicitor General
DONNA M. MURASKY
LUTZ ALEXANDER PRAGER
Office of the Attorney General for the District of Columbia
441 Fourth Street, NW
Washington, DC 20001
(202) 724-6609

Attorneys for Cross-Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

The cross-petition presents a question on which this Court recently denied certiorari in identical circumstances. *See Seegars v. Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005), *cert. denied*, *Seegars v. Gonzales*, 546 U.S. 1157 (2006) (No. 05-365). Because cross-petitioners identify no reason why a different result should obtain in this case, the cross-petition should be denied.

1. Preliminarily, there is an issue regarding the Court's jurisdiction. The cross-petition relies on the petition in *District of Columbia v. Heller*, No. 07-290 (filed Sept. 4, 2007), but that petition was not filed against cross-petitioners and does not seek to change the court of appeals' judgment with respect to them. *See* Cert. Pet. ii. The cross-petition procedure (like a cross-appeal in the lower courts) exists in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor. *See, e.g., Atkins v. Parker*, 472 U.S. 115, 123 (1985). The rare cases in which this Court has noted that it has granted conditional cross-petitions have thus been limited to circumstances where the cross-petitioners at least partially prevailed in the lower court. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464 (2001); *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983); *Snepp v. United States*, 444 U.S. 507, 507 (1980).

In this case, by contrast, the judgment below was entirely adverse to cross-petitioners: the D.C. Circuit held that their claims must be dismissed because they lack standing. Petitioners District of Columbia and Mayor Adrian M. Fenty had no basis for seeking re-

view of that disposition, and thus did not seek certiorari against cross-petitioners. The proper course for cross-petitioners was to raise their standing arguments in a timely petition for certiorari, which they failed to do.

To be sure, Supreme Court Rule 12.5 allows "a respondent seeking to file a conditional cross-petition" to do so after the time for filing a petition has expired. That rule, however, is best understood to refer to a respondent whose legal interests conceivably could be put at issue in the initial petition, not to entitle *any* party who claims the status of respondent under Rule 12.6 to file what would otherwise be an untimely petition, even if there is no legal reason for the putative cross-petitioner to have waited to see if a petition for certiorari would be filed.

2. In any event, there is no reason to grant certiorari on the question presented by the cross-petition any more than there was in *Seegars*. In that case, all of the plaintiffs wanted to own handguns but none did, except one who kept the handgun he owned outside of the District. *Seegars*, 396 F.3d at 1250. One of the plaintiffs owned a shotgun, which she kept bound by a trigger lock, and which she alleged she would want to unlock if she felt endangered. *Id.* at 1251. The D.C. Circuit held that none of the plaintiffs had standing (*id.* at 1256), and the plaintiffs petitioned for certiorari.

Opposing certiorari, the Solicitor General explained that the D.C. Circuit's decision in *Seegars* and its prior decision in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), were consistent with this Court's cases on pre-enforcement standing, because risking a criminal prosecution was not "the sole [al-

ternative] means of seeking relief." Brief in Opposition at 10 ("BIO"), *Seegars v. Gonzalez* (No. 05-365) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (alteration in BIO). Petitioners there, like cross-petitioners here, could have applied to register their handguns and challenged any resulting denials. The Solicitor General further explained that the circuit conflict alleged in the petition did not exist (*id.* at 11), and that the fear of one petitioner who owned a lawfully registered shotgun that she would be prosecuted was too speculative to support standing if her only intention was to unlock her gun for use in self-defense. *Id.* at 13. This Court denied the petition. Because the circumstances under which standing was denied in this case are indistinguishable, certiorari should be denied here as well.

3. Cross-petitioners' claims of conflicts with decisions of this Court and other courts of appeals rest largely on a mischaracterization of the D.C. Circuit's standing jurisprudence. The court of appeals does not hold that a civil rights plaintiff lacks standing unless he first violates the law. This case is a perfect example. The D.C. Circuit held that respondent Dick Heller had standing although he had not violated any law. Instead, he applied for a gun permit, and it was denied. On that basis, the court of appeals found that he had standing to challenge not only the District's handgun ban, but also the ancillary requirements that those carrying handguns be licensed under D.C. Code § 22-4504(a) and that firearms be kept "unloaded and disassembled or bound by a trigger lock or similar device" under D.C. Code § 7-2507.02. Pet. App. 8a.

The D.C. Circuit's ruling thus recognizes the standing of a class of potential plaintiffs who have not violated the law yet have demonstrated a concrete inter-

est in the outcome of this litigation. That class of persons incurs no substantial burden; the application process is simple. *See* Pet. App. 120a (Heller's application). The court of appeals had no need to address whether, as a prudential matter, a broader class of persons would have standing to challenge the handgun ban and other restrictions on handgun possession and use if someone who, like Heller, unsuccessfully invoked the permit application process did not have standing.

Cross-petitioners themselves point out that the leading D.C. Circuit precedent concludes that it would be inappropriate to require plaintiffs to violate the law before recognizing their standing. Cross-Pet. 13 (citing *Navegar, Inc.*, 103 F.3d at 1000-01). There is no conflict between that admonition and the ruling in this case. If the D.C. Circuit in a later case applies its pre-enforcement standing jurisprudence to bar all pre-enforcement claims of a certain type, as cross-petitioners suggest is possible, review can be granted to consider that later ruling.

4. Properly understood, there is no conflict between the D.C. Circuit's ruling on standing and this Court's precedents. Cross-petitioners claim that the decision below cannot be reconciled with *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), *Babbitt*, 442 U.S. 289, and *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988). But each of those cases arose in a different regulatory environment. As *Babbbit* itself noted, whether a plaintiff has standing or not cannot be discerned under any "precise test." *Babbitt*, 442 U.S. at 297; *cf. Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974) ("maturity of [pre-enforcement] disputes for resolution before a prosecution begins is decided on a case-by-case basis,

by considering the likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue").

Nor is there a conflict between the court of appeals' standing holding and decisions of other circuits. Cross-petitioners point to the Sixth Circuit's decision in *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ("*PRO*"). Far more informative, however, is that court's holding that individuals in cross-petitioners' circumstances lack standing to bring a pre-enforcement challenge to a ban on a particular type of weapon. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997) ("Plaintiffs' assertions that they 'wish' or 'intend' to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III.").

PRO is distinguishable. The plaintiffs there were held to have standing because they–in contrast to the plaintiffs in *Magaw* and cross-petitioners here–owned guns and were faced with the choice of moving their guns outside of the city or suffering penalties because of a change in law. (One plaintiff was an organization with members in that position.) The fact that the plaintiffs owned guns that became unlawful was the critical factor in finding standing and was the reason the Sixth Circuit in *PRO* distinguished its earlier decision in *Magaw*. *See PRO*, 152 F.3d at 530. Contrary to what Heller states, there is no indication that any plaintiffs had standing on the basis that they "pos-

sess[ed] weapons outside of [the] jurisdiction." Cross-Pet. 12.[1]

5. Because respondent Heller was held to have standing, the cross-petitioners have little if anything to gain from their submission. Any judgment by this Court in No. 07-290 will bind the District as against all of its citizens, including cross-petitioners. Indeed, where one plaintiff has sufficient standing to bring the merits of a dispute within the courts' subject matter jurisdiction, this Court has on more than one occasion noted that it is unnecessary for it to consider whether other plaintiffs also have standing. *See Babbitt*, 442 U.S. at 299 n.11; *Buckley v. Valeo*, 424 U.S. 1, 12 (1976).

The D.C. Circuit ruled that Heller was entitled to injunctive relief against the District that is indistinguishable from the relief sought by the other cross-petitioners, with only the possible exception of Gillian St. Lawrence. Unlike Heller and the other cross-petitioners, she claims to have a lawfully registered weapon—a shotgun—in the District. Cross-Pet. App. 15. She "intends to use the gun if necessary in lawful self-defense within her home," but she fears "criminal penalties if she assembles and unlocks her shotgun at home under any circumstance" in supposed violation of D.C. Code § 7-2507.02. *Id.*; *see* Complaint at 3-4. The District agrees, however, that the D.C. Code does not prohibit her from using a lawful firearm in self-

---

[1] Cross-petitioners' "see also" citation to *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999), is similarly unavailing. In that case, standing was granted to a plaintiff who was prohibited from carrying a gun under a federal statute, consequently lost his job as a police officer, and challenged the statute under the Second, Fifth, and Tenth Amendments.

defense. *See* Pet. for Cert. 7 n.2. She accordingly does not have a live case or controversy with the District.

Heller and cross-petitioners agree that this Court should grant the District's petition for certiorari. Cross-Pet. 9. Granting the cross-petition would unnecessarily complicate the pending litigation on the meaning of the Second Amendment. Indeed, given the D.C. Circuit's holding that Heller has standing, the District would have little interest in defending the decision of the court of appeals that cross-petitioners lacked standing even if the cross-petition were granted.

CONCLUSION

For these reasons, the cross-petition should be denied.

Respectfully submitted,

THOMAS C. GOLDSTEIN
CHRISTOPHER M. EGLESON
Akin, Gump, Strauss,
Hauer & Feld LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

WALTER DELLINGER
MATTHEW M. SHORS
MARK S. DAVIES
GEOFFREY M. WYATT
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

LINDA SINGER
Attorney General for
the District of Columbia
ALAN B. MORRISON
Special Counsel to the
Attorney General
TODD S. KIM
Solicitor General
Counsel of record
EDWARD E. SCHWAB
Deputy Solicitor General
DONNA M. MURASKY
LUTZ ALEXANDER PRAGER
Office of the Attorney
General for the District
of Columbia
441 Fourth Street, NW
Suite 600-S
Washington, DC 20001
Tel. (202) 724-6609

OCTOBER 12, 2007

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(5)

No. 07-335

10-23-07

In The

Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,

Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

ALAN GURA*
ROBERT A. LEVY
CLARK M. NEILY III

GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The city cannot point to any other federal appellate circuit that would apply special standing hurdles in a "non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Seegars* v. *Ashcroft*, 396 F.3d 1248, 1254 (D.C. Cir. 2005).

Nor does the city justify such a doctrine, a task that the court of appeals has repeatedly declined to attempt. Nor can the city seriously question that the D.C. Circuit's standing doctrine is in conflict with decisions of this Court, as well as the practice in other circuits. After all, the D.C. Circuit has explicitly acknowledged these facts. Indeed, since the filing of this cross-petition, the D.C. Circuit reiterated its acknowledgment that its unique standing doctrine is subject to scrutiny by this Court:

> To be sure, as our opinion suggested, the Supreme Court may well disagree with *Seegars*, 396 F.3d 1248 (D.C. Cir. 2005), and conclude that all the plaintiffs have standing.

Parker v. *District of Columbia*, 2007 U.S. App. LEXIS 22872 at *4-5 (D.C. Cir. Sept. 25, 2007) (per curiam). Cross-Petitioners thus address only briefly the city's denial of any conflict on the standing issue.

Unable to rationalize the D.C. Circuit's standing doctrine, or meaningfully contest the fact of its conflict with this Court's precedent and that of other circuits, the city primarily argues that this cross-petition is untimely under the rules of this Court, and

otherwise suggests that Cross-Petitioners are not actually harmed by their supposed lack of standing. Neither argument has any merit. The D.C. Circuit developed a standing doctrine that avowedly departs from this Court's precedents and is at odds with the practice of every other federal circuit. This case presents a timely opportunity to correct that departure.

Finally, Cross-Petitioners submit that the city's newly-professed lack of desire to discuss the standing issue is irrelevant. That issue is before this Court because the city filed multiple motions in the court below seeking to dismiss this case for lack of standing. A party's interest in avoiding review of its legal defense does not diminish the need to conduct such review.

ARGUMENT

I. This Cross-Petition Is Plainly Timely.

The Court's rules are not ambiguous.

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court. . . . All parties other than the petitioner are considered respondents.

Sup. Ct. R. 12.6.

> No more than 30 days after a case has been placed on the docket, a respondent seeking to

> file a conditional cross-petition (i.e., a cross-petition that otherwise would be untimely) shall file . . . the cross-petition.

Sup. Ct. R. 12.5.

The petition in No. 07-290 was filed September 4, 2007. This cross-petition was filed six days later, well within Rule 12.5's deadline.

Citing no authority, and perhaps more critically, offering no rationale, the city simply asserts that Rule 12.5 "is best understood to refer to a respondent whose legal interests conceivably could be put at issue in the initial petition." Opp. to Cross-Pet. at 2.

Had this Court intended to limit Rule 12.5 in this fashion, it would have done so by amending the text of Rules 12.5 and 12.6. The fact that Rules 12.5 and 12.6 allow Cross-Petitioners to file their petition suffices to establish their "legal interests" in doing so. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (citations omitted). That maxim applies equally to interpreting court rules.

But even if the text of Rule 12.5 supported the city's restrictive interpretation, which it does not, Cross-Petitioners plainly satisfy those unwritten

restrictions as well. The court of appeals struck down the laws challenged by Cross-Petitioners, ordering the district court to enter judgment in accordance with their prayer for relief. According to the city, "[t]he cross-petition procedure . . . exists in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor." Opp. to Cross-Pet. at 1 (citation omitted). That is exactly what Cross-Petitioners seek to accomplish here.

Indeed, it is precisely that favorable aspect of the judgment – the fact that Cross-Petitioners obtained their desired relief – that the city invokes against the cross-petition's merits, terming the Cross-Petition both untimely and superfluous. Opp. to Cross-Pet. at 6.

It is entirely rational for parties who obtain partial relief to await the filing of a petition for certiorari before filing a conditional cross-petition challenging aspects of the decision below that were adverse to them.[1] Cross-Petitioners are satisfied with the court of appeals' decision granting them relief, but it was not until that relief was jeopardized by the

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[1] That is especially true in this case, considering the city's lengthy delay in filing its petition. Indeed, for some time it was unclear whether the city would file a petition. Cf. *Parker* v. *District of Columbia*, 2007 U.S. App. LEXIS 12467 (May 24, 2007) (Silberman, Senior Judge). Nothing would have prevented the city from changing its mind at the last moment, and there could be no guarantee that the city would have timely filed its petition even had it intended to do so.

petition for certiorari that they were constrained to conditionally contest the adverse aspect of the decision below – i.e., the lower court's aberrant standing doctrine, which, if uniformly applied, would generally deprive Cross-Petitioners and other civil rights litigants of meaningful access to Article III courts.

II. The Decision Below Deprives Cross-Petitioners of Their Right to Access the Courts, a Right Not Dependent Upon Whether It Is Enjoyed by Others in Different Circumstances.

The city does not question, as it cannot, that Respondent Heller had standing to bring the action. It requires no explanation to show that the government's denial of a permit application is an Article III injury. However, the fact of Heller's injury does not diminish Cross-Petitioners' injuries, nor does it make those injuries irrelevant.

The city aptly notes that so long as one plaintiff is found to have standing, courts typically do not scrutinize the standing of the other plaintiffs. Opp. to Cross-Pet. at 6. Indeed, Cross-Petitioners stressed this point at the outset of oral argument below, to no avail.[2] Cross-Petitioners agree that they should not

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[2] Cross-Petitioners cited to the court below its opinion in *Animal Legal Def. Fund* v. *Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) ("We hold that . . . one of the individual plaintiffs, has standing to sue. Accordingly, we need not pass on the standing of the other individual plaintiffs.") *Glickman* held

(Continued on following page)

have been dismissed from the case once the court of appeals accepted Heller's standing, but they are left with the decision on standing as it was written, not as Cross-Petitioners believe it should have been written.

The lower court's standing decision unmistakably bars Cross-Petitioners and all other city residents, including Heller, from accessing the federal courts under the Declaratory Judgment Act. It is simply untrue that Cross-Petitioners "have little if anything to gain from their submission." Opp. to Cross-Pet. at 6. This Court has long recognized the right of District of Columbia residents to have their constitutional rights vindicated by Article III courts. *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

Indeed, the unique circumstances that gave Heller standing to pursue his claims in this case under the D.C. Circuit's deviant standing doctrine cannot be easily replicated by other District of Columbia residents. The city incorrectly suggests that "the class of persons" who, like Heller, apply to register a handgun, "incurs no substantial burden; the application process is simple." Opp. to Cross-Pet. at 4

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that psychic injury from observing unhappy zoo animals conferred standing to challenge the government's failure to regulate zoos in a manner that would improve the animals' lives. Applying this benchmark, Cross-Petitioners should each have standing to challenge not only the deprivation of their own constitutional rights, but the constitutional deprivations visited upon their fellow humans as well.

(citing Heller's permit application). The suggestion ignores the fact that Heller only had a handgun to register because he once lived in a state where it was legal for him to purchase one. A city resident who is not prescient enough to have bought a handgun while living outside the District could never complete the form submitted by Heller. Under federal law, handguns cannot be purchased at retail across state lines. An individual wishing to buy a handgun can only take delivery of the firearm from a federally licensed dealer in his own state. 18 U.S.C. § 922(b)(3).[3]

At a minimum, the standing doctrine established by the lower court requires that a city resident seeking access to the federal courts in the District of Columbia must first live somewhere else in order to lawfully acquire a firearm that he or she must have in order to complete the city's registration process. This is not only a "significant burden," it is also one that depends entirely on the happenstance of other jurisdictions declining to enact similarly restrictive firearms laws.

In any event, not all Cross-Petitioners had an interest in challenging the handgun ban. The city

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[3] Cross-Petitioners Palmer and Lyon also possess handguns outside the city, but did not seek to register them, reasonably believing that such an attempt would be a futile act. *Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968) (per curiam); *Grid Radio* v. *FCC*, 278 F.3d 1314, 1319 (D.C. Cir. 2002). Following the court of appeals' decision, Palmer sought to register a handgun but the city refused even to give him the application form.

recognizes that Gillian St. Lawrence is interested only in rendering her lawfully-registered shotgun operational, in violation of the city's functional firearms ban, D.C. Code § 7-2502.07. St. Lawrence has no administrative process to invoke, no form to submit and have denied. "At least one other plaintiff (Gillian St. Lawrence) did address Section 7-2507.02 as it applied to shotguns but she did not have the same injury as Heller – the denial of a license." *Parker*, 2007 U.S. App. LEXIS 22872 at *4 (citation omitted).

There is no reason to mandate that city residents in St. Lawrence's position, wishing to challenge a particular law, must depend for their relief on other city residents who wish to challenge other laws, and can do so only by virtue of having once lived elsewhere. Whether a case or controversy exists between two parties depends upon the plaintiff's relationship with the defendant. The question is whether the plaintiff seeking relief has an injury, not whether third-parties with different claims, under different circumstances, are also injured.

Cross-Petitioners are puzzled by the city's insistence that review would be proper "[i]f the D.C. Circuit in a later case applies its pre-enforcement standing jurisprudence to bar all pre-enforcement claims of a certain type." Opp. to Cross-Pet. at 4. As noted at the outset of this brief, the D.C. Circuit has unambiguously barred all "non-First Amendment preenforcement challenge[s] to a criminal statute that ha[ve] not reached the court through agency

proceedings," *Seegars*, 396 F.3d at 1254, absent a showing of an explicit threat that can apparently never be satisfied. It cannot be gainsaid that Cross-Petitioners have been barred from court under a broad, categorical rule.

The risks inherent in outsourcing one's standing also confirm that Cross-Petitioners can be severely harmed if they do not personally have standing. Heller is in excellent health and better spirits, but in the (unlikely) event that he were to pass away or move out of the District of Columbia for reasons unforeseeable, Cross-Petitioners might obtain no relief at all. Surely an individual's right of access to the courts cannot be forcibly assigned to the discretion of a third party.

III. The Decision Below Clearly Conflicts with Decisions of This Court and Various Federal Appellate Courts.

Unaccountably, the city denies that the D.C. Circuit's standing doctrine conflicts with various decisions of this Court and several federal appellate circuits. There is little to add to the repeated and explicit statements of the D.C. Circuit acknowledging precisely that conflict. See Cross-Pet. at 9-12.

Of this Court's plainly contrary decisions in *Medimmune, Inc.* v. *Genentech*, 127 S. Ct. 764 (2007), *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979), and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), the city states only that

these cases "arose in a different regulatory environment." Opp. to Cross-Pet. at 4. Cross-Petitioners recognize that none of those cases involved challenges to the District of Columbia's gun laws, but precedent is generally more instructive than the precise facts of any specific case.

There is no reason to limit *Medimmune* to patent challenges, *Babbitt* to labor union elections, or *American Booksellers* to the displaying of books. *Babbitt*'s observation that standing depends upon the unique circumstances of each case, Opp. to Cross-Pet. at 4-5, does not deprive the case of precedential value – and does not alter the fact that *Babbitt*'s rule is in conflict with that of the D.C. Circuit, as the court below so readily acknowledged. Pet. App. 6a-7a; *Seegars* v. *Gonzales*, 413 F.3d 1, 2 (D.C. Cir. 2005) (Williams, Senior Circuit Judge).

The city's effort to explain away the conflict between the court below and the Sixth Circuit in *Peoples Rights Organization, Inc.* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ("*PRO*") likewise fails. While the city claims that "*PRO* is distinguishable," the D.C. Circuit is of a different opinion:

> Plaintiffs correctly argue that [PRO] supports preenforcement standing in precisely this circumstance. . . . But *PRO* is plainly inconsistent with [*Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997).] Indeed, the imminence of enforcement appears to have been greater in *Navegar* . . . .

Seegars, 396 F.3d at 1255. The D.C. Circuit noted its awareness of the Sixth Circuit's earlier decision in *NRA of America* v. *Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997), see *Seegars*, 396 F.3d at 1255, but it was *PRO* that was found to represent "precisely [the] circumstance" of a pre-enforcement challenge to the District of Columbia's gun prohibitions. *Id.*

The city claims that "there is no indication that any plaintiffs [in *PRO*] had standing on the basis that they 'possessed weapons outside of the jurisdiction,'" Opp. to Cross-Pet. at 5-6 (citing Cross-Pet. at 12) (internal punctuation omitted). The language of *PRO* is otherwise: "The complaint asserts that these individuals continue to own and possess (either within *or outside of the City*) large capacity magazines and firearms" which may be banned. *PRO*, 152 F.3d at 528 (emphasis added). The D.C. Circuit noted that the *PRO* plaintiffs would be deemed injured had they been forced to "store their weapons outside the City, depriving themselves of the use and possession of the weapons." *Seegars*, 396 F.3d at 1255 (quoting *PRO*, 152 F.3d at 529).

In any event, Heller is plainly injured by the fact that he cannot register a handgun, which he keeps by necessity – but certainly not choice – outside the District of Columbia. Yet Heller is not injured any more than are Palmer and Lyon, who also possess handguns outside the District of Columbia; nor is Heller more injured than Parker and Ambeau, who cannot buy handguns; nor is Heller more injured than St. Lawrence, who possesses a non-functional

shotgun within the city but has no futile administrative process to test.

IV. The City's Permission Is Not Required to Petition the Court for Certiorari.

Finally, it does not matter that "the District would have little interest in defending the decision of the court of appeals that cross-petitioners lacked standing even if the cross-petition were granted." Opp. to Cross-Pet. at 7. The government cannot seriously be heard to argue that having prevailed on the standing issue below, certiorari should be denied because it has no interest in discussing the matter further.

The question on certiorari is whether the issue presented is an important one on which guidance from this Court is necessary. Cross-Petitioners, whose right to access the federal courts has been denied at the city's urging, submit that the court of appeals' near-total abrogation of the Declaratory Judgment Act in direct contravention of this Court's precedent satisfies that standard.

As for the claim that granting the Cross-Petition would over-complicate the case, this Court routinely considers questions of standing before resolving substantive constitutional questions. See, e.g., *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2750-51 (2007).

CONCLUSION

If the Court is inclined to grant the petition, it should also grant the cross-petition.

Respectfully submitted,

ALAN GURA*
ROBERT A. LEVY
CLARK M. NEILY III
Attorneys for Cross-Petitioners

GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

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**Counsel of Record*

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IN THE

Supreme Court of the United States

Shelly Parker, Tom G. Palmer,
Gillian St. Lawrence, Trace Ambeau,
and George Lyon,
Cross-Petitioners,

v.

District of Columbia and
Mayor Adrian M. Fenty
Cross-Respondents.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For The District of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF CROSS-PETITIONERS

Peter J. Ferrara
Counsel of Record
American Civil Rights Union
10621 Summer Oak Court
Burke, VA 22015
703-582-8466

Attorney for *Amicus Curiae*
American Civil Rights Union

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded by former Reagan Senior White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, including those under the Second Amendment, and that Second Amendment rights are protected as strongly and equally with the others in the Bill of Rights.

Counsel of Record for all parties were timely notified of this brief under Rule 37 and have consented to its filing.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. The letters of consent to the filing of this brief have been enclosed.

STATEMENT OF THE CASE

The original plaintiffs filed this action on February 10, 2003 in the United States District Court for the District of Columbia against the District of Columbia and then Mayor Anthony Williams arguing that the District's laws banning handguns and the possession of functional firearms within the home for self-defense and other uses violated their rights under the Second Amendment to the U.S. Constitution.

Plaintiff Shelly Parker resides in a high crime area of the District. (App. 10). She has been active in organizing her community against drug dealers, who have threatened her and her neighbors as a result. (App. 10). These local criminals broke the front window of her house and the back window of her car, stole a security camera from outside her home, and smashed a car into her back fence. (App. 10).

In the dark of night on February 12, 2003, a drug dealer known as "Nanook" started banging on her front door and tried to pry into her house, while repeatedly yelling "bitch, I'll kill you, I live on this block, too." (App. 10--11).

Parker wants to keep a handgun in her home for self-defense, but under the District's laws she would face criminal prosecution and penalties if she possesses a handgun or any other functional firearm in her home, including rifles and shotguns. D.C. Code Section 7-2507.02 states, "each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreation purposes within the District of Columbia." This provision applies to rifles and shotguns as well as handguns, and by its very terms prohibits the assembling and loading of a firearm for self-defense even within the home. (App. 39) D.C. law even prohibits

carrying a functional firearm from one room within the home to another for self-defense.

Plaintiff Dick Heller also resides in a high crime neighborhood of the District. (App. 12). Two open air drug markets operate near his home. (App. 12). He is a Special Police Officer employed by the District to provide security for the federal judiciary at the Thurgood Marshall Federal Judicial Center. (App. 12). In that capacity, Heller is armed with a handgun during the day. (App. 12). He desires to possess a functional handgun and rifle in his home for self-defense, but that is prohibited under the District's criminal law. Violating those laws would subject him to criminal penalties and dismissal from his work.

Heller applied to the District for permission to keep a handgun within his home for self-defense, but was refused. (App. 12).

Plaintiff Tom G. Palmer is a gay man who resides in the District. (App. 13-14). In 1982, he was assaulted by gay bashers, but he successfully warded off the attack with a handgun. (App. 14). He desires to possess a functional handgun and a functional rifle in his home for self-defense. (App. 13-14). But under the District's laws he would face criminal prosecution and penalties if he does so.

Plaintiff Gillian St. Lawrence resides in the District of Columbia. (App. 14). She lawfully owns a registered shotgun which she desires to keep assembled and unlocked within her home to use for self-defense. (App. 15). But under the District's laws she would face criminal prosecution and penalties if she does so.

Plaintiff Tracey Ambeau resides in the District of Columbia, and desires to possess a functional handgun within her home for self defense. (App. 16). But under the

District's laws she would face criminal prosecution and penalties if she does so.

Plaintiff George Lyons resides in the District of Columbia, and desires to possess a functional handgun and a functional rifle within his home for self defense. (App. 16). But under the District's laws he would face criminal prosecution and penalties if he does so.

The District has openly stated in many forums that it will prosecute these Plaintiffs if they violate any of the District's criminal prohibitions on handguns and functional rifles and shotguns.

The District Court nevertheless ruled that the Second Amendment does not provide any effective right to Americans to keep and bear arms. On appeal, the District of Columbia Circuit Court held that all of the above Plaintiffs except Heller did not have standing to bring this action. The court held that Heller did have standing because he had applied for a permit for a handgun, which the District denied.

The Circuit Court then went on to evaluate Heller's claims. The Court ruled that the Second Amendment does protect an individual right of each U.S. citizen to keep and bear arms, and that the District's prohibition on handguns within the home for self-defense violated that Amendment.

The District has filed a petition for a writ of certiorari to review that ruling. The original plaintiffs besides Heller have filed a cross-petition asking this Court to grant a writ of certiorari on the issue of standing and to restore their standing in this case. The American Civil Rights Union now files this *Amicus Curiae* brief supporting the cross-petitioners.

SUMMARY OF ARGUMENT

The Statement of the Case above shows that all of the original plaintiffs have proven sufficient facts to establish standing in this case. No further factual foundation is needed for the courts to evaluate their Second Amendment claims and rule on them. It would not help the Second Amendment analysis in any way for these plaintiffs to violate the law and be criminally prosecuted. That would not help the courts to decide if the Second Amendment provides an individual right to keep and bear arms. Whether the Second Amendment does provide such an individual right does not turn on any additional facts that would arise from such a criminal violation and prosecution.

Indeed, the fact that Heller applied to register a handgun and was denied did not play any significant role in deciding whether the District's handgun prohibitions violated the Second Amendment. The law already states that all such handgun applications will be denied for any handguns not already registered as of September, 1976, except for applications from retired District police officers. .

Nor can it be said that if the plaintiffs in this case went ahead and violated the law by maintaining functional handguns in their homes for self-defense that their prosecutions would be "conjectural" or "hypothetical" or "speculative". The District is well known for vigorously enforcing its gun laws. It openly states as much over and over in public and in this case, and has specifically threatened to prosecute these particular plaintiffs if they should violate the law.

On these facts, the ruling of the Court below on standing is in conflict with the governing precedents of this Court, and with the decisions of the other circuits.

Moreover, this case presents vitally important questions of law concerning whether citizens will have meaningful and equal access to the courts to protect their Second Amendment rights The courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires the courts to give it the same zealous protection as every other right stated in our founding document. But the ruling on standing in this case does not reflect equal access to the courts for Second Amendment rights as for other rights.

ARGUMENT

I. THE DECISION OF THE COURT BELOW ON STANDING CONFLICTS WITH THE ESTABLISHED PRECEDENTS OF THIS COURT AND THE DECISIONS OF THE OTHER CIRCUIT COURTS.

The proven facts in this case show that all the plaintiffs have standing for their Second Amendment claims. The plaintiffs are all law abiding residents of the District who desire to keep handguns or other functional firearms in their homes for self-defense. They each have good reason to fear that crimes and violence may be committed against them.

But the laws of the District prohibit the plaintiffs from possessing and using handguns or other functional firearms for self-defense within the home. All firearms are banned absent registration with the District, and the law prohibits the District from accepting any handgun registrations after September, 1976, except for applications from retired District police officers. The law even prohibits plaintiffs from carrying a handgun from one room to another within their homes for self-defense. Moreover, even lawfully registered firearms must be kept unloaded and disassembled or disabled with trigger locks. The law by its very terms does not allow residents to assemble or unlock and load such

firearms even for self-defense within the home. These gun laws are the strictest and most onerous in the nation, and if the Second Amendment prohibits any gun restrictions, it would prohibit these.

If any of the plaintiffs violate these laws, their criminal prosecution is not "conjectural" or "hypothetical" or "speculative". Quite to the contrary, there is no doubt the District would prosecute them if their violations are discovered. Indeed, on numerous occasions the District has publicly threatened to prosecute these precise plaintiffs if they violate the District's gun laws.

Therefore, absent standing to challenge the District's gun laws, these plaintiffs face an oppressive legal dilemma. They must either forego their constitutional rights under the Second Amendment or risk criminal prosecution and punishment. The laws and traditions of our nation do not permit such cavalier disregard of constitutional rights.

Given these established facts, all of the original plaintiffs in this action do have standing under the established precedents of this Court and the decisions in other circuits across the country. No further factual foundation is needed for the courts to evaluate their Second Amendment claims and rule on them. It would not help the Second Amendment analysis in any way for these plaintiffs to violate the law and be criminally prosecuted. That would not help the courts to decide if the Second Amendment provides an individual right to keep and bear arms. Whether the Second Amendment does provide such an individual right does not turn on any additional facts that would arise from such a criminal violation and prosecution.

Indeed, the fact that Heller applied to register a handgun and was denied did not play any significant role in

deciding whether the District's handgun prohibitions violated the Second Amendment.

In the recent case of *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), this Court said, in the words of Justice Scalia,

> "[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but does not eliminate Article III jurisdiction. For example, in *Terrace v. Thompson*, 263 U.S. 197...(1923), the State threatened the plaintiff with forfeiture of his farm, fines and penalties if he entered into a lease with an alien in violation of the State's anti-alien land law. Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."

127 S. Ct. at 772.

After citing some more cases, this Court went on to say,

> "In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do....That did not preclude subject-matter jurisdiction because the threat eliminating behavior was effectively coerced....The dilemma posed by that coercion—putting the challenger to the choice between abandoning his

> rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.' *Abbott Laboratories v. Gardner*, 387 U.S. 136... (1967).

This *Medimmune* analysis applies directly to the present case. Denying standing to all but one of the original plaintiffs puts them exactly in the position of being required to expose themselves to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced. They are faced exactly with the dilemma of abandoning their constitutional rights or risking prosecution. This Court said in *Medimmune* that standing should be recognized precisely to avoid this situation.

Similarly, in *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979), this Court said,

> "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights'....When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'"

442 U.S. at 298. *Accord: Steffel v. Thompson*, 415 U.S. 452 (1974);*Lake Carriers' Ass'n v. Macmullen*, 406 U.S. 498 (1972); *Abbott Laboratories*, 387 U.S. at 152-153.

Again, plaintiffs in the present case are precisely seeking to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute. But

under the ruling of the Court below on standing, the excluded plaintiffs are precisely forced to expose themselves to arrest or prosecution to challenge the statute deterring the exercise of constitutional rights.

Even the Court below noted that its ruling on the standing issue seemed to be in conflict with this Court's decision in *United Farm Workers.* (Pet. App. 6a). The Court also found a conflict with *Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988), discussed further below.

But the Court nevertheless felt compelled to follow *Navegar v. United States,* 103 F.3d 994 (D.C.Cir. 1997), as the governing precedent in the D.C. Circuit. That case considered challenges by gun manufacturers to the Federal assault weapons ban. The court found standing by those manufacturers whose products were specifically named in the Federal legislation. But other manufacturers whose products only seemed to match various features and characteristics prohibited in the legislation were denied standing, leaving them to choose either to cease manufacturing various products or risk prosecution.

Similarly, in *Seegers v. Gonzales,* 396 F. 3d 1248 (D.C. Cir. 2005), the court felt compelled to follow *Navegar* in denying standing to District of Columbia residents who wanted to challenge the District's gun laws on Second Amendment grounds as well. But even the *Seegers* court noted that the *Navegar* rule seemed to be in conflict not only with *United Farm Workers*, but also with Supreme Court and D.C. circuit precedents involving pre-enforcement challenges to agency regulations. 396 F.3d at 1252 -1254. In those cases, *Seegers* correctly noted that,

> "[A]n affected party may generally secure review before enforcement so long as the issues are fit for judicial review without further factual development

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> "The allegedly constitutionally protected conduct in the record before us is clearly defined and clearly unlawful under a statute that the District apparently enforces regularly, and under which there is certainly no doubt that plaintiffs reasonably apprehend enforcement.

396 F.3d at 1258. Judge Sentelle so rightly concluded that this Court's precedents in *United Farm Workers* and *American Booksellers* should have been the controlling authorities in *Seegers*, not the D.C. Circuit's confused *Navegar* decision. The same is true for the present case.

Finally, the decision of the D.C. Circuit below on the standing issue conflicts with the decisions of other Circuits on that issue, as well as the established precedents of this Court. The Fourth Circuit in *Mobil Oil Corp. v. Attorney General of Virginia,* 940 F.2d 73, 75 (4th Cir. 1991) stated,

> "Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution."

The Tenth Circuit in *Hejira Corp. v. MacFarlane,* 660 F.2d 1356 (10th Cir. 1981) found that the plaintiffs had standing to challenge a statute prohibiting the sale of drug paraphernalia even where no criminal prosecutions had commenced and no specific arrest was threatened.

The Sixth Circuit in *Peoples Rights Organization, Inc. v. Columbus,* 152 F.3d 522 (6th Cir. 1998) found standing in a case involving a pre-enforcement challenge to an assault weapons ban in Columbus, even though there had

been nor prior prosecutions under the law. The court found standing because otherwise the plaintiffs faced this dilemma:

> "They can either possess their firearms in Columbus and risk prosecution under the City's law, or alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons."

152 F.3d at 529.

The Seventh Circuit in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) ruled that a police officer had standing to challenge a statute prohibiting firearms possession by persons convicted of domestic violence offenses. The officer was not forced to first violate the law and subject himself to prosecution to challenge the statute.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING MEANINGFUL AND EQUAL ACCESS TO THE COURTS TO PROTECT CONSTITUTIONAL RIGHTS

This case presents important questions of law concerning whether citizens can even gain access to a court to protect their constitutional rights under at least the Second Amendment, if not under the other Amendments embodying the Bill of Rights as well. If plaintiffs cannot gain standing until they "have been singled out or uniquely targeted for prosecution" then many people will be coerced into giving up their constitutional rights to avoid the personal dangers of criminal prosecution. *MedImmune*, 127 S. Ct. at 772-773. This would be a sad and tragic loss of constitutional rights.

Moreover, this Court should act to ensure that all constitutional rights, and all rights within the Bill of Rights,

are equally enforced. But the D.C. Circuit seems to be applying a separate, stricter standard for standing in Second Amendment cases and other cases involving guns. *Seeger* and the decision below, where standing was mostly denied, involved Second Amendment challenges, and *Navegar* itself, on which these cases relied, was also a gun case.

Yet, in *Hejira*, plaintiffs were found to have standing to challenge a drug paraphernalia statute even though no one had ever been prosecuted under the statute and no specific arrests were threatened. In *United Farm Workers,* the politically correct United Farm Workers Union was found to have standing to challenge a labor regulation statute simply because the union's practices were covered by the statute and the law was expected to be generally enforced, although again apparently no one had yet been prosecuted under the statute.

In *American Booksellers*, plaintiffs were found to have standing to challenge a new criminal statute prohibiting commercial displays involving "sexually explicit nudity, sexual conduct, or sadomasochistic abuse…which is harmful to juveniles". 484 U.S. at 386. The basis for that finding was simply that "the state ha[d] not suggested that the…law will not be enforced" and there was no reason to assume it would not be, even though there had not been any prosecutions under the statute at the time. *Id.* at 393. In contrast, standing was not found in the present case even though the District has repeatedly proclaimed and demonstrated vigorous enforcement, and threatened the very plaintiffs in the case with prosecution if they violated the law.

Seegers and even *Navegar* itself noted that the standard for standing seemed to be lower for First Amendment cases than for others, particularly Second Amendment cases, even though that difference has no basis

in this Court's decisions. But as Judge Sentelle so rightly stated in his dissent in *Seegers*, "I know of no hierarchy of Bill of Rights protections that dictates different standing analysis." 396 F.3d at 1257.

As previously stated, while courts in First Amendment cases are concerned that constitutionally protected speech will be chilled by unconstitutional restrictions before they are struck down, courts in Second Amendment cases should be equally concerned that constitutionally protected ownership, possession and use of firearms will be chilled by unconstitutional restrictions before they are struck down. This important issue should be resolved by the Court in this case as well.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the requested Cross-Petition for a Writ of Certiorari, and reverse the decision of the District of Columbia Circuit below on the standing issue.

Peter J. Ferrara
Counsel of Record
American Civil Rights Union
10621 Summer Oak Court
Burke, VA 22015
703-582-8466

Attorney for *Amicus Curiae*
American Civil Rights Union

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10-12-07

No. 07 – 335

In The

Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER,
GILLIAN ST. LAWRENCE, TRACEY AMBEAU,
AND GEORGE LYON,

Cross – Petitioners,

vs.

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Cross – Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for The District of Columbia

BRIEF OF *AMICI CURIAE* : RUSSELL NORDYKE, SALLIE NORDYKE, T S TRADE SHOWS, MADISON SOCIETY AND GOLDEN STATE SECOND AMENDMENT COUNCIL ON "STANDING ISSUES" IN SUPPORT OF CROSS-PETITIONERS' CONDITIONAL CROSS-PETITION

Donald E. J. Kilmer, Jr.
Attorney for Amici
1645 Willow Street, Suite 150
San Jose, California 95125-5120
(408) 264-8489

QUESTIONS PRESENTED

1. Did the Court of Appeals improperly impose a prudential justicability standing requirement on the *Parker* litigants, over and above the Article III requirements?

2. Should the *Parker* litigants be required to risk felony prosecution under federal gun laws in order to have standing to challenge a local weapon ordinance?

3. Is it doctrinally sound for a court of appeals to analyze the underlying substantive rights at issue, as a foundation for making a ruling on standing?

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MEMORANDUM OPINION
FOR THE ATTORNEY GENERAL:
Whether the Second Amendment
Secures an Individual Right 3

Interest of Amici Curiae[1]

Amicus curiae T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California.

Amicus curiae MADISON SOCIETY has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens.

Amicus curiae GOLDEN STATE SECOND AMENDMENT COUNCIL is an independent firearms rights organization dedicated to the advancement of the right to keep and bear arms in California.

Amici herein have an especially keen interest in the outcome of this case, as *Nordyke v. King*, 319 F.3d 1185 (2003), reh'g en banc denied at *Nordyke v. King*, 364 F.3d 1025 (2004), cert. denied at *Nordyke v. King*, 543 U.S. 820 (2004) is once again pending in the Ninth Circuit Court of Appeals. [Case No.: 07-15763]

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[1] This amicus brief is filed with the consent of the parties in compliance with Supreme Court Rule 37(2)(a). The written consent of the petitioners and the respondents are on file with this Honorable Court, having been filed on September 28, 2007 and October 3, 2007, respectively. Pursuant to rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Introduction

In the event that this Honorable Court grants the District of Columbia's Petition for Writ of Certiorari, the Court should also take up the standing issues presented in the Conditional Cross-Petition filed by SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, and GEORGE LYON.

This case arises out of a controversy between citizens and their local government over the meaning of the "right to keep and bear arms." The case was brought by residents of that *District (not exceeding ten Miles square)*[2] who have challenged the gun prohibition policies enacted and enforced by the District of Columbia.

A paradox of this case/controversy, is that the substantive (merits) question presented – *Whether the Second Amendment confers an individual right?* – has been answered in the affirmative by Congress; a body with exclusive legislative authority[3] over the District of Columbia.

Congress has acknowledged and affirmed an *individual rights* interpretation of the Second Amendment in three separate instances; all within recent memory of anyone reading this brief. See:

- THE RIGHT TO KEEP AND BEAR ARMS – Report of the Subcommittee on the Constitution. United States Senate, Ninety-Seventh Congress, 2d Session. February 1982. [Document No. 88-618]
- Firearm Owners' Protection Act of 1986. Pub. L. No. 99-308, 100 Stat. 449 (1986)

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[2] U.S. Constitution, Art. I, Sec. 8, Cl. 17

[3] Id.

- Protection of Lawful Commerce in Arms Act. Pub. L. No. 109-92, 119 Stat. 2095 (2005)

The executive branch of the federal government is in accord. See:

- MEMORANDUM OPINION FOR THE ATTORNEY GENERAL – Whether the Second Amendment Secures an Individual Right. Issued on or about August 24, 2004. Authors: Steven G. Bradbury, Principal Deputy Assistant Attorney General; Howard C. Neilson, Jr., Deputy Assistant Attorney General; and C. Kevin Marshall, Acting Deputy Assistant Attorney General. Available online at: www.usdoj.gov/olc/secondamendment2.pdf.

The Seat of Government of the United States is a unique jurisdictional region. In some ways it is treated like a state. See 18 U.S.C. § 921(a)(2) for a statute that treats the District of Columbia like a "state" for purposes of *enforcing* the nation's gun laws.

Constitutionally, the District of Columbia must be treated as the federal enclave that Article I, Section 8, Clause 17 creates. See also: *Adams v. Clinton*, 90 F.Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000).

It should be without question that citizens of the United States who reside in the shadow of the Nation's Capitol ought to enjoy the purest, undiluted protection of the Bill of Rights precisely because of where they live.[4]

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[4] "[T]here can be little doubt, that the inhabitants composing [the District] would receive thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union." From: Commentaries on the Constitution of the United States, by Justice Joseph Story. Chap. XXIII, Section 1214.

***Parker* Presents No Prudential Standing Issues**

If the Court grants the District's petition for a *writ of* certiorari, this Court should also grant the conditional cross-petition in order to further explain its prudential standing jurisprudence and to instruct the lower courts on the appropriate standing analysis that must be applied to pre-enforcement constitutional challenges of criminal statutes. The errors made by the lower courts lie in their superficial analysis of the prudential standing issues in this case, and cases like it.

This Honorable Court has a rich history of resisting the temptation to expand its jurisdiction beyond the limitations imposed by Article III, and those prudential limitations based on the very structure of the Constitution itself.

Declining an invitation to render an advisory opinion to the administration of our first president, and basing this declination on the doctrine of separation of powers, Chief Justice John Jay wrote to President George Washington on August 8, 1793:

> We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

> We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.[5]

Constitutional justicability issues are governed by the "Cases and Controversy" doctrine set forth in Article III, Section 2. Usually framed as ripeness, mootness, and prohibitions on advisory opinions and the taking up of political questions, these irreducible limitations on judicial power are also supplemented by the Supreme Court's self-imposed prudential limitations as developed by case law.

These self-imposed prudential barriers to federal court jurisdiction have usually been addressed through inquiries into an individual litigant's standing to bring a case, as contrasted with mere Article III limitations addressing appropriate issues that may come before a federal court. See generally: *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

In §§ 3-7 through 3-16 of his treatise on American Constitutional Law, Third Edition (2000), Professor Tribe describes how this Honorable Court has evolved beyond *Flast v. Cohen*, and has begun analyzing prudential standing as being grounded in the separation-of-powers doctrine, so that the purpose behind these rules of justicability have become the means of keeping the judicial branch within its proper bounds

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[5] The Founders' Constitution: Volume 4, Article 3, Section 2, Clause 1, Document 34. The University of Chicago Press http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html The Correspondence and Public Papers of John Jay. Edited by Henry P. Johnston. 4 vols. New York and London: G. P. Putnam's Sons, 1890-93.

and preventing its intrusion into the prerogatives of the coordinate branches. In other words, the purpose of the prudential standing requirements is to make meaningful the central concepts of limited government and separation of powers. See also: *Allen v. Wright*, 468 U.S. 737 (1984) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

This separation-of-powers analysis is precisely what is missing in the cases: *Navegar v. United States*, 103 F.3d 994 (1997); *Seegars v. Ashcroft*, 396 F.3d 1248 (2005) and *Parker v. District of Columbia*, 478 F.3d 370 (2007).

The plaintiffs in *Navegar*, were challenging the actions of a co-equal branch of government, namely a statute enacted by Congress. Nonetheless, the *Navegar* Court still neglected to address the separation-of-powers doctrine in its pre-enforcement standing analysis. (i.e., How would the *Navegar* plaintiffs pre-enforcement challenge to a criminal statute passed by Congress offend the separation-of-powers doctrine?)

There is not even a hypothetical challenge to congressional authority in either *Seegars* or *Parker*. The laws challenged by the plaintiffs in these two cases are creatures of municipal legislation in a federal enclave that is governed exclusively by Congress.

As noted above, Congress and the Executive Branch have acknowledged and affirmed that the Second Amendment is a fundamental right held by individuals; yet this wayward District has made rules that contradict those coordinate branches of the federal government. It has stripped inhabitants of that "*ten Miles square*" of a right expressly guaranteed by the Bill of Rights.

If anything, the Court of Appeals in *Seegars* and *Parker* (which was required to follow *Seegars*) has offended the separation-of-powers doctrine by refusing to grant standing to all the plaintiffs in both cases to litigate their challenges to the District of Columbia's gun laws.

A proper pre-enforcement standing analysis must address the underlying policy for limiting judicial action that offends the separation-of-powers doctrine. When those considerations are not present, the self-imposed prudential standing rules of this Court must fall away and any remaining justicability issues should be analyzed under the bare minimum requirements of Article III constitutional jurisprudence.

This case may only be rendered moot if the District of Columbia's gun laws are repealed. There is no political question as the popular branches of government, with constitutional authority over the District, have announced their positions in law and legal memoranda. No party is petitioning the Court for an advisory opinion, except to the extent that declaratory judgments under 28 U.S.C. §§ 2201 and 2202 are advisory opinions.

The only remaining applicable test is whether the case is ripe for review. The factual record below is well developed, leaving only a legal question for this Court. The effect of delaying review on the *Parker* plaintiffs (until one of them gets arrested or becomes a victim of violence?) is immediate and severe, in that they cannot exercise a fundamental right (e.g., the right of self defense in their own homes) without risking criminal prosecution. Nor is there any further administrative discretion that the District can exercise in this matter. It admits that it routinely denies all permits for private possession of handguns and intends to prosecute all other violations of its firearm ordinances. (e.g., keeping an assembled and loaded rifle or shotgun in a residence within the District). See generally: *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

This case is not even really a "pre-enforcement" challenge. It is really a "pre-prosecution" challenge. The law is being enforced right now through civic virtue of the *Parker* plaintiffs.

They are obeying the law (for now) and forgoing their right to defend themselves in their own homes while this case is pending. Telling them that they must defy their government

(which will require confrontation with authorities, arrest and prosecution) in order to have standing to assert their "*right to keep and bear arms*" is more than a little *Kafkaesque*. Are we really ready to provoke a twenty-first century reenactment of the events at Concord Bridge and Lexington Green? This Court should take the opportunity to say: "No, we are not."

Becoming a Criminal Defendant to Achieve Standing to Challenge the District of Columbia's Gun Laws

It is one thing to impose, as a condition of challenging an unconstitutional law, a requirement that a civil plaintiff also become a criminal defendant in order to have standing to challenge that law. It is quite another thing to force that civil rights litigant to also break the laws of other jurisdictions and attempt to engage other persons in a conspiracy to violate those laws merely to gain access to our federal courts.

If *Navegar* and *Seegars* remain the rule on pre-enforcement/pre-prosecution standing, then residents of the District of Columbia will have to violate, not only the District's ordinances to gain access to federal court, but they must also violate federal (and probably state) gun laws and persuade a federally licensed firearm dealer to do the same.

This goes a step beyond a non-violent act of civil disobedience.

A federal firearm licensee (FFL/dealer) must ensure that all sales or deliveries of firearms are made in compliance with state and local law. See 18 U.S.C. § 922(b)(2) and Title 27 C.F.R. § 478.99(b)(2). These federal laws effectively impose a duty on an FFL to know the gun laws in the jurisdictions of its customers.

All retail sales of new/used modern firearms require the completion of ATF Form 4473 (5300.9). The purchaser of a firearm must set forth his/her residence address. [See Box #2]

He or she must also answer a series of questions relating to his/her eligibility to own/possess firearms. [See Box #12] The form is available at: http://www.atf.gov/forms/4473/

That means that an FFL in Virginia and/or Maryland, who probably knows that residents of the District of Columbia cannot legally possess handguns or fully assembled long guns, could be in violation of federal law if he or she were to complete the sale of a functioning gun to a D.C. resident.

18 U.S.C. § 922(b)(3) and Title 27 C.F.R. § 478.99(a) also prohibit a licensee from making a firearm sale to a resident of a state other than the state in which the licensee's place of business or premises is located. There are exceptions for rifles and shotguns that are of no help to D.C. residents.

Both the gun purchaser and the licensee must make truthful statements on ATF Form 4473 or suffer a potential penalty of up to 10 years imprisonment and/or up to a $250,000 fine for making a false statement in connection with enforcement of federal gun law. See generally: 18 U.S.C. § 924 *et seq*. See also: 18 U.S.C. §§ 1001 (false statement) and 1621 (perjury).

Finally, one would assume that a competent U.S. Attorney would also charge the defiant D.C. resident and his/her accomplice FFL with the crime of conspiracy to commit an offense against the United States. See: 18 U.S.C. § 371.

In other words, it is not legally possible for a D.C. resident to acquire and keep in their home a handgun or functioning long gun under federal law *even if* he or she were prepared to violate the District of Columbia's gun laws.

This Court can correct this absurdity by accepting the underlying case for review and by granting the *Parker* litigants cross-petition for certiorari on standing issues.

Repudiation of "Collective Rights" Standing Analysis

The Court of Appeals in *Parker* noted that the Ninth Circuit had recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiffs lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. See *Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 & n.18 (2003).

The Court of Appeals in *Parker*, went on to criticize that approach as doctrinally unsound. See: *Parker v. District of Columbia*, 478 F.3d 370, 376 (2007). If this Court grants the District's petition for certiorari, and grants the cross-petition on standing issues; it should also take the opportunity to instruct the courts of appeal on the flaws of reaching past standing in a to impose an unwarranted (and wrong) decision on the merits, and then turn around and dress it up as a "standings" issue.

Amici herein have an especially keen interest in the outcome of this case, as *Nordyke v. King*, 319 F.3d 1185 (2003) is once again pending in the Ninth Circuit Court of Appeals. Footnote 3 from that opinion speculated on a potential "as applied" challenge relating to the *Nordyke* plaintiffs' First Amendment claims. In litigating that issue, *Nordyke* plaintiffs also "perfected" their Second Amendment claims. After summary judgment was rendered for the County of Alameda, the matter is once again pending in the court of appeals. [Case No.: 07-15763]

Nordyke was distinguished from *Silveira* in Judge KLEINFELD's dissent from the denial of the petition for rehearing en banc. See: *Nordyke v. King*, 364 F.3d at 1026 *et seq.*:

> Whether the Second Amendment guarantees an individual right is more likely to affect the outcome in this case than in

> *Silveira*. In *Silveira*, the challenge was to California's ban on assault weapons. Reasonable regulation of the individual right guaranteed by the Second Amendment might well have led to the same result, no relief, as the result reached by the panel using the "no individual right" argument. In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Also instructive is Judge Gould's dissent from the denial of en banc rehearing. *Nordyke* Id. at 1027:

> I dissent with recognition that we only recently denied en banc review in a case presenting a similar issue on the scope of the Second Amendment right to keep and bear arms. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), reh'g en banc denied, 328 F.3d 567 (9th Cir. 2003), cert. denied, 124 S. Ct. 803 (2003). However, *Nordyke* differs from *Silveira*, and is more appropriate for en banc reconsideration of the holding in *Hickman*. In contrast to *Silveira*, which involved a challenge to a California law restricting the possession, use, and transfer of assault weapons, 312 F.3d at 1056, a provocative issue, appellants in *Nordyke* challenged a local ordinance prohibiting the possession of all firearms on county property, which had the

> effect of foreclosing a traditional gun show. Some may consider that the regulation of assault weapons may implicate too many difficult considerations beyond that of whether the Second Amendment confers an individual or collective right. The ordinance at issue in *Nordyke*, if it must be tested in light of an individual Second Amendment right, will not raise the same concerns. If the Second Amendment confers an individual right, then the *Nordyke* gun possession ban presents a better context in which our court might have assessed the constitutionally permissible bounds of gun regulation.

The state of the law in the Ninth Circuit is best summed up in Judge Kleinfeld's dissent from denial of rehearing en banc:

> Our court has erased 10% of the Bill of Rights for 20% of the American people. No liberties are safe if courts can so easily erase them, and no lover of liberty can be confident that an important right will never become so disfavored in popular or elite opinion as to be vulnerable to being discarded like the Second Amendment.
>
> [...] Our court takes what to me is a position verging on droll legal humor, that the right is a "collective" right belonging to state government, meaning that it is enforceable only by the state, even when the state is the violator.
>
> [...] Some people think that the Second Amendment is an outdated relic of an earlier time. Doubtless some also think that constitutional protections of other

> rights are outdated relics of earlier times. We The People own those rights regardless, unless and until We The People repeal them. For those who believe it to be outdated, the Second Amendment provides a good test of whether their allegiance is really to the Constitution of the United States, or only to their preferences in public policies and audiences. The Constitution is law, not vague aspirations, and we are obligated to protect, defend, and apply it. If the Second Amendment were truly an outdated relic, the Constitution provides a method for repeal. The Constitution does not furnish the federal courts with an eraser.
>
> KLEINFELD, Dissent from denial of rehearing en banc *Nordyke v. King*, 364 F.3d at 1025.

Many of this Court's references to the Second Amendment are brief, but they all portray it as an individual right, usually lumping it together with the rest of the Bill of Rights. Interpreting the phrase "*right of the people*" in the Fourth Amendment this Court suggested that as used there and in the First and Second Amendments, it denotes rights of individuals. See: *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

What is desperately needed is additional Supreme Court Jurisprudence on this issue to either: a) repudiate the states' right (collective) view, or b) establish an intellectually valid basis for it by addressing the following problems which the "collective rights" view fails to address:

- How can any litigation brought to remedy an infringement of the "*right to keep and bear arms*" be addressed through a suit brought by the states on

behalf of "*the people*." Must the states assume the role of *parens patriae* on behalf of their citizens? This is contrary to doctrines articulated by this Court. "The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those Prohibitions." See: *City of Boerne v. Flores*; 521 U.S. 507, 524 (1997)

- Construing the "self-executing" provisions of the 15th Amendment in *So. Carolina v. Katzenbach*; 383 U.S. 301, 324 (1966), this Court wrote: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), 485-486; *Florida v. Mellon*, 273 U.S. 12, 18."

- No Court decision advancing the collective states' right theory mentions – much less reconciles – this Court's holdings that states have no power over the militia as against federal control.[6]

- No decision advancing the collective states' right theory offers any reconciliation of the Second Amendment's use of the term of art "*right of the people*" used in several other parts of the Bill of Rights. Are we to believe that the First Congress used "*right of the people*" to mean a right of individuals in

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[6] See generally: Houston v. Moore, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), Martin v. Mott, 25 U.S. 19 (1827) (President's power to call militia from state control into federal service), Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), Perpich v. Department of Defense, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection because federal authority over the militia is paramount)

the First Amendment, but 16 words later in the Second it means a right of the states, but 26 words later in the Fourth it means a right of individuals again?

- No collective rights opinion offers any answers to the point raised in *U.S. v. Emerson,* 270 F.3d 203, 227: "As used throughout the Constitution, the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority, never 'rights.'"

- Then there are the Ninth and Tenth Amendments which specifically refer to people's rights and powers and the states' mere powers. See also: *Katzenbach*, supra at p. 323: "The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."

As Judge Gould stated in his concurring opinion in *Nordyke v. King*, 319 F.3d at 1197:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of lawyers, scholars and judges. The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.
>
> Gould Concurring [footnotes omitted]

Conclusion

If "*the people*" described in the Second Amendment have no standing to assert claims under that Amendment, then this Court needs to give an explanation to the "*the people*" defined by the First, Fourth, Ninth and Tenth Amendments as to what differences exist between these two classes of persons.

Here are passages from an infamous case in which this Court attempted to interpret what it means to be a citizen and/or person with standing to invoke the protections of the United States Constitution and its Amendments: [emphasis is added]

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went**. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

> [...] **Nor can Congress deny to the people the right to keep and bear arms**, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.
>
> [...] It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that **different rules** may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writing of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

The case, of course, is *Dred Scott v. Sanford*, 60 U.S. 393 (1856). The "different rules" promulgated in that case were an expedient that backfired. This Court in 1856 made a mistake that took a civil war and passage of the Fourteenth Amendment to rectify. That mistake was to deny standing to a man seeking justice in a federal court for rights he knew he had under the United States Constitution.

The collective states' right standing doctrine makes a corollary mistake and a mockery of justice. The rule creates a non-entity. It postulates a class of "*the people*" who have a "*right to keep and bear arms,*" but who nevertheless have no standing to invoke that right.

This Court can correct the prudential and collective rights standing mistakes made by the lower courts by granting the District of Columbia's Petition for Certiorari and also granting the *Parker* litigants' Cross-Petition on the standing issues.

Respectfully Submitted,

Donald E. J. Kilmer, Jr.
Attorney for Amici
1645 Willow Street, Suite 150
San Jose, California 95125-5120
Don@DKLawOffice.com
Voice: (408) 264-8489
Fax: (408) 264-8487